

NOMINATION

HEARING OF THE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE ONE HUNDRED SEVENTH CONGRESS FIRST SESSION ON

EUGENE SCALIA, OF VIRGINIA, TO BE SOLICITOR, U.S. DEPARTMENT OF
LABOR

OCTOBER 2, 2001

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NOMINATION

TUESDAY, OCTOBER 2, 2001

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:36 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Edward M. Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Harkin, Mikulski, Wellstone, Murray, Reed, Edwards, Gregg, Enzi, Hutchinson, Bond, Collins, and Sessions.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. Good morning. The committee will come to order.

I thank everyone for joining us as the committee considers the nomination of Eugene Scalia to be the Solicitor of Labor.

Mr. Scalia has been praised as a “dedicated legal scholar” and a lawyer with an “extraordinarily good mind.” He has had a distinguished legal career at the law firm of Gibson, Dunn & Crutcher, as Special Assistant to Attorney General of the United States William P. Barr, and as an aide to Secretary of Education William Bennett.

His record makes him extremely qualified for many positions in this administration. However, I have read many of Mr. Scalia’s articles, and I have serious concerns about whether his background provides the right fit for the position of Solicitor of Labor, and I plan to explore those concerns today.

My colleagues know that this committee has been supportive of President Bush’s nominees. In fact, we have already confirmed 12 nominees to the Department of Labor, and we have done so as quickly as possible and are moving quickly on the remaining three as well. This committee wants to ensure that the President and the Secretary of Labor have the team they need in place to carry out the important missions of the Department on behalf of millions of working men and women and their families across the country.

As the third-ranking official at the Department of Labor, the Solicitor provides advice and guidance on virtually every policy, legislative, regulatory, and enforcement initiative of the Department and its agencies on issues of vital importance to all these working families.

In addition, since most labor laws do not include a private right of action, the Solicitor serves as the workers’ lawyer by using his discretion and judgment to decide whether to enforce workers’ rights. As a result, legal decisions and policy decisions at the De-

partment of Labor are so intertwined that they often cannot be separated.

When Congress reviews administration nominees, it considers the person's entire background of experience and writings. What a candidate has done prior to his nomination matters to Congress and to the American people.

Most of us have serious concerns about Mr. Scalia's nomination to this important position based on our review of his record and his writings, which clearly suggest that his views are outside the mainstream on many issues of vital importance to the Nation's workers and their families.

Throughout his career, Mr. Scalia has frequently opposed workers' rights. It appears that Mr. Scalia has represented individual workers on only one occasion, when particular workers were suing their union after crossing a picket line. He has never filed comments in support of a pro-worker regulation. He has said that employers should not be strictly liable in sexual harassment cases unless they expressly endorse the conduct of the harasser, despite the fact that the U.S. Supreme Court has held that employers are in fact strictly liable for supervisor harassment in many cases.

Mr. Scalia has also encouraged employers to challenge so-called liberal EEOC interpretations of the Americans with Disabilities Act when they are inconsistent with "sensible business practice."

As Solicitor, Mr. Scalia would refer cases to the EEOC and have a role in defining "sensible business practice." In addition, Mr. Scalia has said that employees should pay for their own safety equipment when the equipment is required by law.

Mr. Scalia has also argued that union workplaces should be exempted from certain workplace laws such as regular OSHA inspections and the overtime requirements of the Fair Labor Standards Act; but if we follow this logic, union workers would not be protected by the same minimum standard of rights provided to non-union workers, thereby undermining the basic function of labor laws which is to provide a floor of rights for all workers.

In addition, Mr. Scalia has written in very strong opposition to ergonomics protections. For example, he has written that "The science of ergonomics is notoriously doubt-ridden and controversial."

He has said that "The very existence, not to mention the significance of repetitive strain injuries is of course very much in doubt."

He has in fact ridiculed the scientific basis for ergonomics. He has written that "as a medical science, ergonomics is quackery."

Many of us on the committee and in Congress respectfully disagree. The prestigious National Academy of Sciences estimates that one million men and women will lose time from work this year because of ergonomics injuries, which will cost the economy \$50 billion. There is a wealth of evidence that ergonomics injuries exist, can easily be diagnosed, are caused by workplace practices that are no longer acceptable and can be readily reduced by simple workplace modifications. In 1997 and 1998, both the National Institute of Occupational Health and Safety and the National Academy of Sciences reported similar conclusions.

Yet despite study after study documenting the causes and dangers and remedies for ergonomics injuries, Mr. Scalia has consistently argued that ergonomics is quackery based on junk science.

I have serious concerns that given this position, Mr. Scalia will be able to provide appropriate advice to OSHA as it continues to work to develop a needed solution to the extremely serious challenge of ergonomics injuries in workplaces across the Nation.

Mr. Scalia has also been critical of OSHA's recordkeeping rule on workplace injuries and illnesses, which is intended to help track occupational injuries and illnesses. As Secretary Chao herself has said, "This rule is a big step forward in making workplaces safer for employees. It is written in plain language and simplifies the employer's decisionmaking process."

With upcoming rulemaking on the ergonomics standards, employer payment for safety equipment, and many other major issues, the Solicitor will be involved in developing many needed new policies as well as enforcing the over 180 laws under the jurisdiction of the Department of Labor. The important position of Solicitor of Labor requires a person who has the confidence of Congress and the country in helping to carry out its essential mission of fairly and fully representing the working men and women of America.

I look forward to Mr. Scalia's testimony and to exploring these cited issues in more detail.

Senator Gregg?

OPENING STATEMENT OF SENATOR GREGG

Senator GREGG. Thank you, Mr. Chairman.

The Department of Labor is obviously a significant department in our management structure as a Federal Government, as it administers over 140 labor laws affecting millions of Americans and American workplaces.

The position of Solicitor is equally important, as he serves as the Department's chief legal counsel. The Solicitor performs an important task not in terms of policymaking but rather in advising the Secretary and other division heads about the legality of the actions and policies they wish to undertake.

The President's nomination of Eugene Scalia testifies to the importance of this position. I do not think the President could have nominated anyone more uniquely qualified to serve as the Labor Department's Solicitor than Eugene Scalia.

Mr. Scalia has at least 10 years of distinguished experience as a labor and employment lawyer, with an unusually broad practice including collective bargaining, arbitration, Title VII, ADA, OSHA, and wage and hour issues. He is a nationally-recognized expert in the area of employment law, having written numerous law review articles, including one noted piece on sexual harassment referred to by the U.S. Supreme Court.

Mr. Scalia is a public servant at heart, having served two prior Cabinet Secretaries, and has donated his time as a visiting professor at the University of the District of Columbia Law School. I am pleased that he is willing to participate in public service and join again in this administration.

The chairman has raised a number of issues which he has identified as concerning himself and possibly other members of this

panel. I hope that those issues have not prejudged the decision on this nominee. I believe that this nominee, Mr. Scalia, can answer every one of those issues extraordinarily effectively. And, rather than my paraphrasing his answers, I will allow him to do so.

But let me simply point out that specifically in the area of ergonomics, this Congress has spoken and said that the proposals of OSHA were not a good idea; that the courts used the term "junk science" as a legal term, and it is not a pejorative designed by this nominee but rather, a legal term which is used by the courts; and that Mr. Scalia's positions on ergonomics do not differ greatly and are certainly not out of the mainstream from the majority of the United States Congress, which rejected the initial proposals that came forth from OSHA.

In the area of recordkeeping, the track record of OSHA on recordkeeping and the burden which that has put on the small businesses of America could not be worse. This committee over the last 4 years has held numerous hearings where we have pointed out the problems which OSHA has generated as a result of its structure and the manner in which it deals especially with small employers.

I do not know of one agency of the Federal Government, other than Immigration, which is unique, that I receive more complaints about in my office from small business than OSHA. And I think that raising issues about the manner in which the recordkeeping has proceeded in OSHA is a legitimate question to be raised, and it is not out of the mainstream. Why isn't it out of the mainstream? Because this committee has held hearings on that specific issue innumerable times as we have tried to make sure that OSHA is more responsive to the needs of the employees in this country.

We all recognize that OSHA has come through some tough times. It made some progress under Mr. Dear. It has unfortunately fallen back recently, but hopefully it will get its act together. But this nominee's writings in this area, rather than being out of the mainstream, are quite consistent with votes taken by the Congress and hearings held in this committee.

So I look forward to hearing from the nominee. I think his extraordinary expertise will contribute greatly to the Department of Labor, and it will be a pleasure to listen to his input on the issues which are raised by the chairman of the committee.

Mr. Chairman, since Senator Warner had wanted to be here to introduce the nominee personally, and unfortunately, as you know, the defense authorization bill is on the floor, and he has actually been asked to go down to the White House, so he cannot be here, I would ask that Senator Warner's opening statement be made a part of the record.

The CHAIRMAN. It will be so included.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR WARNER

Chairman Kennedy, and my other distinguished colleagues on the Senate Committee on Health, Education, Labor and Pensions, I am pleased to have the opportunity to introduce Eugene Scalia to serve as Solicitor for the Department of Labor. I would also like to welcome and recognize his family in attendance today.

As the Chief legal officer in the Department, the Solicitor of Labor is a key figure in the enforcement of labor and employment laws and regulations. The Solicitor also plays an integral role in the process to establish new standards to protect our nation's workforce.

Prior to his nomination, Mr. Scalia was a labor lawyer and partner at a law firm in Washington, D.C.

He has specialized in labor and employment law for over a decade. His distinguished legal career is marked by an intricate knowledge and understanding of the full range of labor laws and pertinent issues.

Mr. Scalia's extensive writings in this field have also been influential in debate on a variety of related initiatives.

The needs and make-up of the American workforce are constantly changing. We must continue to be responsive to the concerns of the American worker.

The Department of Labor is responsible for the protection of the American worker, ensuring that employees are able to operate in a safe environment, receive just compensation for their work, and that everyone has fair and equal opportunity for employment. The Department also provides assistance to individuals through training programs and related services.

I trust that the opinions and recommendations of Eugene Scalia as Solicitor of Labor will be in the best interest of American workers and in line with the mission of the Department.

I look forward to working with Mr. Scalia and officials at the Department on matters currently pending and on new initiatives which will come before the Department for consideration.

I urge the Committee's favorable consideration of his nomination.

The CHAIRMAN. Mr. Scalia, we welcome you.

Would you care to introduce the members of your family, or proceed in your own way.

Mr. SCALIA. Yes, thank you, Mr. Chairman.

I have some of my family members here today. Beginning immediately behind me to my right is my wife, Patricia, and seated next to her, my son, Jack Christie; she is holding our daughter Brigitte Anne, who is 3 months old today. Next to her is Nino, and next to her, our daughter Megan McCarthy. And next to Megan is Shannon Rice, who is a long-time family friend and babysitter to our children.

Also with me today, seated to my left, is Mr. Tom Korologos, who I think is known to many of you and has been helpful to me in preparing for the hearing today; my brother Paul, otherwise known as Father Paul Scalia or, within the family as "Father Brother"; and my mother, Maureen Scalia.

And in the row behind them are my sister-in-law, Terry Scalia, my nephew William, his father Britt Courtney, my brother-in-law, and his son Timothy.

And finally, my brother John Scalia, seated behind my wife.

The CHAIRMAN. Thank you very much. We welcome all of them. Thank you.

Before we proceed I have statements of Senators Clinton, Hutchinson, and Bond.

[The prepared statements of Senators Clinton, Hutchinson, and Bond follow:]

PREPARED STATEMENT OF SENATOR CLINTON

Mr. Scalia, thank you for being here with us today. I believe that it is more critical than ever to ensure that this Congress fills the position of Solicitor General at the Department of Labor—a position of extreme importance to all workers in America for it is the Solicitor General that provides legal advice and guidance on virtually every policy, legislative, regulatory and enforcement initiative at the Department of Labor.

For the past three weeks we have witnessed the great backbone of our society—the brave men and women who have worked tirelessly in the rescue and recovery efforts at the World Trade Center, at the Pentagon, and in the fields of Pennsylvania—and, we must do all we can to ensure the safety and health of these workers and the many other workers who will be called into duty to help our nation recover from the destruction of the attacks, as well as recover from an economy that has faltered. It is no time to turn a blind eye to the workers of America.

While I think the timing is critical to nominate and confirm someone for the position of Solicitor General, I have been deeply troubled by a number of positions you have taken in your writings and your work and I hope that today you can help to clarify how those positions will influence the work you would do as Solicitor General.

PROTECTIVE EQUIPMENT

Currently in New York at the site of the World Trade Center thousands of workers have been engaged in a rescue and recovery effort sorting piece by piece through steel, rubble, glass and debris. These workers have been tireless in their efforts, themselves exposed to serious hazards, from falling and shifting debris, cuts and lacerations, and particles in their eyes and lungs. From September 14 to September 24, the New York City health department reported nearly 3,000 injuries among the construction workers, firefighters, police and others involved in the rescue and recovery efforts.

The first line of defense for these workers is the safety equipment they wear—hardhats, gloves, goggles, respirators, safety shoes, and protective clothing. Without this equipment, they have no protection from injury.

On behalf of a client, UPS, you co-authored comments opposing an OSHA proposed rule that would have made clear as a matter of law that requirements that employers provide safety equipment also mean that the employer must pay for this safety equipment. Those comments said that there was no safety and health rationale to require employers to pay for the equipment.

My question is, do you personally share this view? If employers have the legal obligation to provide a safe workplace and to comply with standards, don't you think it should be their legal obligation to pay for the cost of that compliance—in this case requiring them to pay for required safety and equipment?

This proposed rule on employer payment for personal protective equipment is now pending at OSHA. What would be your recommendation to the Secretary on whether there is a legal basis for this rule and whether it should be finalized?

PROJECT LABOR AGREEMENTS

Once the rescue, recovery, and cleanup effort in New York is finally complete, New York will face the task of rebuilding after the tragedy of September 11th. It is too soon to say what will be built where the World Trade Center and surrounding buildings once stood. But it is fair to say that it will be a mammoth rebuilding effort that will undoubtably involve considerable federal and state funds.

On massive construction projects, such as the one that faces New York, project managers often try to control quality, timeliness, and costs by entering into project labor agreements with construction unions. The agreements set forth the terms and conditions covering employment for the project. They help assure that there will not be strikes or other disruptions over the course of the construction, and they help assure construction contractors a ready supply of highly-skilled, experienced workers. Project labor agreements enjoy broad support.

Earlier this year President Bush issued an Executive Order barring the use of Project Labor Agreements on construction projects receiving federal funding or assistance. The Executive Order is in jeopardy—a federal judge has ruled that it is probably illegal and preempted by the National Labor Relations Act. However, as of now it still stands. So, because of this Executive Order, the rebuilding of New York could not be done under a project labor agreement unless New York decided to forego all federal funding.

Do you think President Bush's Executive Order should be revoked? Shouldn't it at least be waived as to New York?

PREPARED STATEMENT OF SENATOR HUTCHINSON

Good Morning. I am very pleased that Chairman Kennedy has given you the opportunity to come before the Committee today and I thank him for scheduling the time necessary to conduct this hearing and move you one step closer to confirmation. And, I do believe that you will be easily and quickly confirmed as you are a man of solid character and impeccable credentials—law degree from the University of Chicago, bachelor's degree from the University of Virginia, editor of the law review, partner at one of the nation's premier law firms, service with the Department of Justice, pro bono professor at the District of Columbia School of Law . . . I could go on and on. However, I will defer to some others whose praise might seem surprising.

One such person is University of Chicago Professor Cass Sunstein, a prominent advisor to Democrats on judicial nominations, who said "In terms of sheer capacity to do a fine job, he's as good a choice as can be imagined." Another such person is William Coleman, the former president of the NAACP and advisor to six Presidents, who said that you would be "among the best lawyers who have ever held [this] important position."

Not only am I convinced that you are extraordinarily well-qualified for this position by your education and experience, I am also supremely confident that your character will lead you to faithfully and fairly enforce our nation's labor laws. In closing, please know that I completely support your nomination, look forward to working with you, and wish you continued success.

PREPARED STATEMENT OF SENATOR BOND

Mr. Chairman, let me begin by indicating how thrilled I am that the President and the Secretary of Labor have been able to attract a candidate of Gene's caliber for this important, sensitive position.

In light of the recent attack on our country, let me also say that I hope we can now see this nomination in its proper perspective: Gene is exceptionally qualified for this job, the President believes he is the best person for this role, and there are no issues in his background that should disqualify him from being confirmed and serving as the Solicitor for the Department of Labor. While I know that there are some who have concerns about whether Gene should be confirmed, in the end their arguments are nothing more than refighting the ergonomics issue on which Gene will not be the policy maker. To jeopardize Gene's nomination over ergonomics would be to wallow in a level of partisanship which the country simply will not tolerate at this time.

Mr. Scalia has pursued a career of mainstream representation of employers in traditional labor law disputes. Our system is built on the idea that each side gets to tell their side of the story. Surely, his nomination should not be blocked because of his role in our adversarial system of justice and government. Had he not represented clients with an interest in the ergonomics issue, his opponents would have nothing controversial to raise, yet he would be just as qualified for this position. The mere fact that he represented employers' interests in a rulemaking, which became so well publicized, and so bitterly fought, should not be held against him, just as it is not the most important factor in his favor.

I'd like to take a moment to set the record straight on a few matters regarding Gene. The positions which Gene advocated with respect to the now-invalidated ergonomics standard were well within mainstream concerns regarding this regulation. His well publicized comments about the science surrounding this issue have also been taken grossly out of context. Specifically, Gene's point was that a high percentage of scientists called to testify by the Department of Labor in these cases were unable to satisfy a test established by the Supreme Court for credibility of evidence to be admitted. He was not the one saying that the scientists were flawed, the judges were the ones making that determination. Nor has he ever said that employers should not be concerned about these injuries, or that employees were not suffering actual injuries. His comments have reflected the difficult and extraordinarily complex issues surrounding this topic.

Gene Scalia opposes the ergonomics proposal promulgated by the Clinton administration, which incidentally, was also opposed by organized labor. Gene has established a consistent record of supporting worker protections in a variety of areas. His work on the issue of sexual harassment has even been cited favorably by Justice

Ginsburg who is closely associated with this issue. Similarly, he has also supported the role unions play in helping to protect employees and insuring compliance with regulations.

As Solicitor, Gene's role will not be to develop policy, but instead it will merely be to advise the Secretary on legal issues affecting the Department. If some of these issues involve setting policy, his job will be to tell the Secretary what the legal arguments are and to recommend the best legal approach. While this role is critical to the Department functioning smoothly, and the Secretary achieving her objectives, it is far different than the level of influence those opposing his nomination would ascribe to him.

Indeed, it's remarkable how much support Gene has from leading liberal labor scholars and even former Solicitors of Labor from Democratic administrations. Reading some of the letters supporting his nomination, one might think that Gene came from the ranks of organized labor. At the very least it is abundantly clear that Gene does not come to this position seeking to pursue an ideological agenda. Those who know his work consistently point out his open-minded approach to finding the best answers to legal questions. These are exactly the skills required to advise the Secretary on the legal issues of the Department. Secretary Chao would not be well served by an attorney that was trying to promote an agenda or ideology and it's clear that Gene is not that type of attorney.

Finally, there is a side of Gene beyond his overwhelming qualifications that should be noted. Gene is a genuinely caring and warm person. He has demonstrated this through his writings which have advocated greater and more creative ways to protect employees, and through his teaching at the University of the District of Columbia's law school for free. His greatest concern before accepting the position at the University of the District of Columbia was whether he could find time to do the job well against the competing interests of his career and being a father. Thankfully for those students, he did find the time and he was regarded as "accessible, warm, and nurturing." The Dean of the law school described his performance as "balanced, accurate and first-rate teaching." These abilities to get along with a wide array of people and offer non-ideological, balanced thinking will be essential in his role as Solicitor. His sincere concern for others also makes it clear that Eugene Scalia will fulfill his role as Solicitor always mindful of the employees and people who rely on the Department of Labor for protection.

Mr. Chairman, I can not imagine a more qualified or exemplary nominee for this position. I look forward to supporting his nomination and seeing Gene confirmed as soon as possible. Thank you.

Mr. Scalia you may proceed in whatever way that you desire.

**STATEMENT OF EUGENE SCALIA, NOMINATED TO BE
SOLICITOR, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC**

Mr. SCALIA. Thank you, Mr. Chairman, Senator Gregg, and members of the committee.

Thank you for holding this hearing today on my nomination to be Solicitor of Labor. It is an honor to appear before this committee.

I would also like to express my deep gratitude to the President for nominating me to this position and my appreciation to the Secretary of Labor, Elaine Chao, for the trust and confidence she has shown in recommending me for the position.

The Solicitor of Labor is the principal legal officer of the Department of Labor. The responsibilities of the Solicitor are essentially twofold—first, to enforce the nearly 200 laws administered by the Department. These include the Fair Labor Standards Act, the Occupational Safety and Health Act, ERISA, and Executive Order 11246.

I have spent most of my professional career as a labor and employment lawyer. The laws I have just mentioned, and the nearly 200 other laws administered by the Department, are important laws. They are to be taken seriously. If confirmed, I pledge to enforce them vigorously.

I should add that in addition to the laws I have just mentioned, the effect on American workers and families of the recent events in New York and at the Pentagon have also impressed on me in a way that could not have happened at my law practice the importance of some other laws administered by the Department, namely, those having to do with unemployment insurance and providing workers assistance in times of disaster and emergency.

The second principal responsibility of the Solicitor of Labor is to provide legal advice to the Secretary and the other principal officers of the Department. For instance, the Solicitor's office reviewed draft rules prepared by the agencies in order to identify legal problems and, if problems are found, to help solve them. The Secretary and the client agencies set the policies in these rulemakings. The Solicitor's function is to help implement those policies within the bounds of the law.

The Solicitor's office has a distinguished and proud tradition. I appreciate the great responsibility as well as the great honor in being entrusted to carry that tradition forward. I do believe that my experience as a labor and employment attorney has prepared me to faithfully discharge the responsibilities of this office should I be confirmed.

My experience has included litigating under the labor and employment laws, and it has also included providing counsel to clients on the requirements of the laws in order that they can properly comply. I have also taught labor and employment law, and I have written broadly in the area.

I would like to take a moment this morning to address one issue that I have written on and that I know some members of this committee will have questions about, and that is the subject of ergonomics. In my writings, I criticized the ergonomics regulatory proposals of the last administration, and I also criticized the writings of some ergonomists.

My pledge to this committee is the following. If confirmed, I will approach the issue of ergonomics as a lawyer—as a lawyer for the Department of Labor and as a lawyer for the United States Government. I recognize and understand that I will not be the Department of Labor's scientist, its physician, or its OSHA Administrator. I have been nominated to be the Department's attorney.

To me, the attorney-client relationship is an almost sacred trust. It is a trust where the attorney's obligations are toward others—in this case, toward the Secretary of Labor, toward the OSHA Administrator, toward the American people, and toward the rule of law itself. It is crucial to the attorney-client relationship that a lawyer's advice be untainted by any personal preferences the lawyer may have. For a lawyer to shade or slant the legal advice he gives in order to advance a private agenda is among the greatest betrayals of his or her duty as a lawyer.

I will be wholly mindful of these things if confirmed as Solicitor of Labor when addressing ergonomics or any other issue. And I will be mindful of something else as well—that if confirmed, I will have a new position, a new client, and new responsibilities. Necessarily, I will consider all issues from a new perspective.

Finally, if the Department does issue an ergonomics rule, I will fairly and vigorously enforce it. Any views that I hold on ergonomics pale beside my strong conviction in the rule of law and in the duty all of us have to uphold and obey the law.

I have been urged in closing to explain why this nomination is important to me personally. One friend suggested to me that I had the law in my veins. I looked into this—I had a blood test—and I do not have the law in my veins.

What I do have is a mother—the Massachusetts-born cofounder of the Young Democrats of Radcliffe—who, when I was 7 or 8 years old, pressed me to read a several-hundred-page biography of Samuel Adams. And later, she sat up with me at night to watch a PBS program called “The Adams Chronicles.”

I knew at the time, living as I was in Virginia, that what my mother was doing was somewhat subversive—educating me in John and Samuel Adams rather than Thomas Jefferson, Patrick Henry, and the other Virginians. But in this and other ways, from as early as I can remember, my mother as well as my father instilled in me the highest respect for service in the Government of the United States and for bringing to that Government service the selfless dedication to national ideals that characterized our Founding Fathers at their best.

That, above all, is why I am honored to have been nominated by the President of the United States; it is why I am honored to appear before this committee and all of you today; and it is the spirit with which I would approach the office of Solicitor of Labor should I be confirmed.

Again, thank you for holding this hearing today, and I look forward to answering your questions.

The CHAIRMAN. Thank you very much, Mr. Scalia.

As far as I am concerned, there is very little doubt about your competency and your basic and fundamental ability. What you are being nominated for now is to be the workers' attorney in the Department of Labor. The Department of Labor is one of the few departments that can bring cases without having clearance by the Justice Department. It has more than 500 attorneys, and there is enormous latitude in terms of discretion about what cases are going to be brought, what regulations are going to be supported, and what kinds of protections are going to be out there in terms of working families.

We will have 8-minute rounds for Senator Gregg and myself, and 6-minute rounds for other members, if that is okay. It seems to be okay, Judd.

Senator WELLSTONE. Can we have a vote on that? [Laughter.]

The CHAIRMAN. I am using up my time.

I make that comment because if you take these decisions—for example, reference was made to OSHA and the challenges they had. The interesting fact is that the injury rate under OSHA fell by 26 percent, from 8.6 per hundred workers in 1993 to 6.3 per hundred workers in 1999—the lowest in OSHA’s 30-year history. These are real results; lives being saved; families that would not have had parents do have parents today.

Decisions that are made by the Solicitor are life and death decisions, and you, or whomever is going to be the Solicitor General, is going to be the workers’ lawyer. We have got to look over your record and find out what in that record would give any of us confidence that you have a fundamental core commitment to working families in this country. I find it very difficult to find much there, and I find in many indications ridicule for working families and for unions in your statements and comments and a disdain for that whole process. Now, maybe I am wrong about it. That is what this hearing is really about. But this is a very important position, and I know that you take your position seriously, as we take ours.

These are some of the comments that you have made with regard to ergonomics. In the January Wall Street Journal: “Home office policy. The most obvious effect will be in conjunction with the ergonomics rule that OSHA proposed last November. That draft rule itself is a major concession to union leaders, who know that ergonomics regulations will force companies to give more rest periods, slow the pace of work, then hire more workers”—you can read into that “dues-paying members”—“to maintain current levels of production.”

Do you have a reaction to that kind of reflection of attitude toward workers? I would ask you to make any comment you wish to on this issue.

Mr. SCALIA. Yes, Senator. I first of all have a great deal of respect for labor unions. I believe they do a great deal of good for their members, and actually, about a year ago, before I had any inkling that I might be nominated for this position, I wrote a somewhat lengthy law review article in which I sought to express my respect for labor unions and my appreciation for some of the good things they do.

As to that particular comment, what I was attempting to emphasize in that article was the stakes for American businesses of the last administration’s proposed ergonomics rule, because I did have concerns with it. And that particular statement was intended to reflect the stakes.

I did not mean to suggest that dues, for example, was all that unions cared about. I do believe that the advocates of ergonomics regulation do so in the belief that it will improve safety. And again, in the article I mentioned to you, that was something that I sought to emphasize on a more general level, that labor unions do seek safety in a very sincere and effective way.

The CHAIRMAN. Well, of course, most of the support for the rules was by unions, who already have protections.

Here are some more quotes. This one is in your "Ergonomics: OSHA's Strange Campaign to Run American Business. Weird science, ergonomists' doubtful theories, like a cruise through Disneyworld's Pirates of the Caribbean to survey ergonomists' theories is to glimpse the exotic, absurd, occasionally amusing, and sometimes grisly."

"There is, however, an alternative conclusion to be drawn from the emergence of psychosocial factors. That is, in medical science, ergonomics is quackery."

These are your statements.

This is in "Government Ergonomic Regulation of Repetitive Strain Injury." "Ergonomics comprise the most comprehensive agenda for regulating the employment relationship since the enactment of the National Labor Relations Act. If proponents prevail, Federal and State safety and health agencies would regulate hours, work, rest breaks, staffing, equipment, workplace hierarchy, and opportunities for promotion. Yet the research said to support such regulation is to a large degree junk science par excellence."

You can make comments on any of those.

Mr. SCALIA. Yes. I will refer to two or three and explain them.

First, the word "quackery"—in that part of my article—and it is the same part of the article where some of the other statements that you read came from, Mr. Chairman—I was addressing a particular proposal that had been made by some people on ergonomics, and that is the proposal to regulate what are called "psychosocial conditions."

Some ergonomists and some fairly well-known organizations had suggested that an ergonomics regulation should, among other things, address the pay and benefits that employees received and opportunities for promotion and other such things. I disapproved of that idea, as did the Clinton Administration ultimately, when they excluded that sort of thing from their rule.

So, Mr. Chairman, that is what I was referring to, that particular idea.

The term "junk science," which I have used on occasion, as Senator Gregg noted, what I was doing in that article was looking at decisions by judges, and I was reporting what the judges were saying. The term "junk science" is shorthand for a U.S. Supreme Court test of when scientific evidence is admissible in court. And I looked for cases where ergonomists had been scrutinized under that U.S. Supreme Court test, and what I found was that in 11 of 14 cases, their testimony had been excluded in full or in part; that is, the judge concluded that the U.S. Supreme Court so-called junk science test was not met. And I reported that, but in one of my articles, I took pains to then point out that you cannot draw firm conclusions from that because, of course, some judges did let the evidence in.

The CHAIRMAN. In the time that I have left, I want to go back to—you had a series of articles during the period of the 1990's, from 1994 through 2001. Let me just mention very quickly that in July of 1997, we had the NIOSH study. Over 600 studies were reviewed. NIOSH concluded: "A substantial body of credible epide-

miological research provides strong evidence of association with MSDs and certain work-related physical factors,” and it continues on. That was in July of 1997.

Then, in October 1997, you had this reference in terms of “junk science par excellence,” with no reference to the NIOSH study.

Then, in 1998, the National Academy of Sciences did a very extensive study where they found that “scientific evidence shows that workplace ergonomics factors cause musculoskeletal disorders.” That was in 1998.

Then, Congress appropriated another \$890,000. In March of 1999, you had the Court’s junk science test reference, with no reference to NIOSH and no reference to the National Academy of Sciences.

You continue your articles, with the Rubber Manufacturers in July, maintaining your same position; briefings for the American Trucking Association, the same position; the Federalist Society in November.

In the year 2000, you continue writing the articles.

In the year 2001, the National Academy of Sciences released on January 18 its second congressionally-mandated report in 3 years on workplace disorders.

In all of your studies, there is absolutely no reference to the National Academy of Sciences or their studies, or to the NIOSH studies; there is no reference or explanation of where they are right or where they are wrong. There is a complete disdain, apparently, for this kind of scientific information in all of your writings.

How can we think that you are going to give a fair hearing to workers when we have the most prestigious, distinguished research groups that Congress is constantly, in a bipartisan way, asking for their advice, and we have three creditable reports, and yet you do not choose to reference any of them or explain your position against any of them?

I think you have just continued to demonstrate a relentless opposition to these kinds of protections, and I think some of us need to understand why we should think that you would be any different in this position in the future.

Mr. SCALIA. One thing that I did take pains to do in a number of things I wrote was to point out that, for example, musculoskeletal pain, so-called ergonomic pain, is real, it is prevalent; I admonished employers that it should be taken seriously. In a couple of the articles that you referred to, Mr. Chairman, I said that many ergonomists are good scientists with valuable suggestions.

So I believe that in my writings, I did acknowledge that there was much of value there as well.

It is true that I did not always cite particular studies on both sides of an issue, and I think there are probably two explanations to your question. One is that some of the pieces you mentioned were legal briefs where I was advancing a client’s position, and where I was aware that the people on the other side of the case were going to be bringing those studies in, and I was trying to draw attention to other studies. And second, when I began writing on this issue, I think there was a lot of attention to what was being said, for example, by NIOSH, which you have mentioned; but in my judgment, there was not much recognition of some of the concerns

being expressed by other respectable organizations, like the American Society for Surgery of the Hand or the California Orthopaedic Association. I tried to bring those into the discussion as well.

The CHAIRMAN. My time is up.

Senator Gregg?

Senator GREGG. Thank you.

I must say that I find one of the ironies of the line of questioning that the chairman has pursued is that he is basically saying, as I understand it—not to characterize what he is saying—the irony is that you are being attacked for attacking a rule which the Congress rejected. On its face, the Congress said this rule was not going to work; yet you are now being attacked for saying, Hey, this rule is not going to work. So there does seem to be an irony there.

But let us go over some of the specifics. Congress likes the National Academy of Sciences, and we listen to them. We like NIOSH, and we listen to them. What we did not like, obviously, was the rule that was proposed by OSHA. So I think you need to separate the National Academy of Sciences and NIOSH from their findings, which were very legitimate, and then, how OSHA took those findings and created a rule out of them which was not consistent with public policy as the Congress decided because it rejected the rule. Is that not correct?

Mr. SCALIA. That is absolutely correct, Senator, and I recognize that if I am confirmed, I am going to have an obligation to consider all sides of issues in a way that, as an advocate in private practice, I did not.

Senator GREGG. Let us step back. This psychosocial factor which was being promoted—even OSHA leadership under the prior administration rejected psychosocial factors, did it not?

Mr. SCALIA. That is correct, Senator.

Senator GREGG. So when you said that that was an application of junk science and a definition defined as quackery, you were making a statement which was essentially consistent with the findings of the OSHA Administrator under the prior administration, were you not?

Mr. SCALIA. That is correct.

Senator GREGG. The issue of junk science, which is a technical term for—is it the Daubert test—

Mr. SCALIA. That is correct.

Senator GREGG. [continuing]. Nobody wanted to give Daubert the credit for it, so they called it junk science—but that was a U.S. Supreme Court decision; correct?

Mr. SCALIA. Yes.

Senator GREGG. So you did not come up with this term.

Mr. SCALIA. No, I did not. It is a test that the U.S. Supreme Court developed.

Senator GREGG. And in those cases where OSHA has had that issue raised—is that the right way to phrase it—how many times has OSHA won on those cases?

Mr. SCALIA. I looked at two groups of cases, and some of them did not involve OSHA; most of the reported cases did not involve OSHA, and I do not know the one lost there, although again, by my count, it was something around three-quarters of the time, the ergonomist was not permitted to testify either in full or in part.

OSHA's own cases—to my knowledge, there have been three that were litigated to judgment, and I think only one relatively small part of those three cases can be called an OSHA victory at this point.

Senator GREGG. Wasn't that reversed?

Mr. SCALIA. Much of one of OSHA's victories was, I believe, but in the Peppridge Farm case, there does remain one small part of that case.

Senator GREGG. So at least in two, and in the majority of the third case that OSHA has raised, where the issue of junk science has been raised as a legal issue, it has been determined that it was applicable. So it is a term which is applicable and appropriate to certain initiatives which have come out of OSHA; is that not correct?

Mr. SCALIA. I think what I would say is that some of the experts that OSHA has used did not meet the junk science test—

Senator GREGG. That is a much better way to phrase it than I did. But essentially, your position is made credible by the fact that courts have supported essentially what you were saying relative to those experts.

Mr. SCALIA. That is how I feel about it. I do not believe the courts were saying that all of ergonomics is junk science.

Senator GREGG. So you are certainly not out of the mainstream, because the courts found basically what you were arguing.

What is your position—it was argued that you have ridiculed, I think was the term, worker families. Have you ever ridiculed worker families?

Mr. SCALIA. No, I have not.

Senator GREGG. And what is your position on home office policy?

Mr. SCALIA. I thought that the decision announced by OSHA to apply regulations within the home somewhat aggressively was mistaken, and that was the point of my article. I did, however, in the article note that at the same time, if an employer were sending employees home to do dangerous work—I used the example of mix chemicals—that was wrong, and that should be stopped by OSHA.

Senator GREGG. Have you ever opposed any of the hundreds of laws or regulations which you would be called on to enforce?

Mr. SCALIA. I have not, Senator. I have not opposed any—the OSHA Act or any of those laws or any existing OSHA regulation or any other law or regulation at the Department.

Senator GREGG. You have written extensively on the importance of supporting the civil rights of plaintiffs and unions. Can you go into that a little bit for us?

Mr. SCALIA. Yes. I think the two principal articles I would mention are two law review articles I wrote. One, I wrote as a member of my law review as a student, and I argued that police who lie at trial and end up leading to a prosecution and possibly a conviction of somebody should be subject to suit under the civil rights laws. And in arguing that, I sided with a dissenting opinion that had been written by Justice Thurgood Marshall. I thought he was right in his approach in that area of the law and that there should be liability.

A second piece I wrote as a practicing lawyer on sexual harassment, and that piece was actually eventually cited by the U.S. Su-

preme Court in a very important decision on sexual harassment. The analysis that I set forth was followed to a degree by the Court. I criticized some things that employers were saying about the law in that article.

Senator GREGG. You also wrote, as you mentioned, an article for the Harvard Law Review—which is a fine university, with wonderful graduates, in a great State—and you mentioned that you wrote it about a year ago, before there was even any inclination that you might be asked to do the Solicitor's job.

Would you characterize that as a pro-union or anti-union piece?

Mr. SCALIA. I certainly do not view it as anti-union. I viewed it when I wrote it and I guess I still view it as pro-union. I spoke at some length about the good things that I had seen unions do for their members, the seriousness with which I believed that they and their lawyers approached safety issues in particular, and I made some suggestions in that article, really suggestions for consideration and discussion, but some suggestions that I thought actually might increase union membership.

Senator GREGG. Have you ever opposed union organizing drives?

Mr. SCALIA. I have never opposed a union organizing drive.

Senator GREGG. And the article that you wrote was essentially an attempt to say, Hey, listen, this is a way that maybe it could be done even better?

Mr. SCALIA. That is correct, and I intended it in a bipartisan spirit.

Senator GREGG. Thank you.

I see my time is up.

The CHAIRMAN. Senator Harkin.

Senator HARKIN. Thank you, Mr. Chairman.

I would first ask that my statement be made a part of the record.

The CHAIRMAN. So ordered.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR HARKIN

Thank You, Mr. Chairman and thank you, Mr. Scalia for meeting with us today. I first want to take a moment and stress, as my colleagues have done, the extreme importance and influence of the Solicitor of Labor.

The Solicitor provides guidance on virtually every policy, legislative, regulatory and enforcement initiative of the Department and its agencies. This position leads a staff of 500 attorneys who are responsible for enforcing the laws under the Department's jurisdiction as well as defending the Department in litigation against it.

I have to admit, Mr. Scalia, that based on your background and past writings and statements against the very worker safety and protection policies this position is expected to enforce and protect, whether you would make an appropriate candidate for Solicitor of Labor.

Your writings indicate extreme views against key worker protections, such as your argument that there is no scientific basis for an ergonomics rule and your claim these repetitive stress injuries may not be real - but rather, psychological. Tell that to the men and women who work in meat-packing and poultry plants. Tell that to

the 600,000 workers each year who lose time from their jobs due to these injuries.

I am also concerned how vigorously you will enforce current laws, including the Americans with Disabilities Act and the Equal Pay Act, which fall under your department when federal contractors are found by the DOL's Office of Federal Contract Compliance to violate those laws. Based on past articles you've written, you were critical of the EEOC for being overzealous in its interpretation of the ADA.

And so I'm glad to have this opportunity to discuss how you would view this new role as Labor Solicitor versus the others you have played in past debates on labor laws and policy.

Senator HARKIN. Mr. Scalia, again, it is not just the ergonomics rule and whether you have opposed it, it's about the tone and the attitude. Obviously, the Solicitor provides guidance on almost all policy, legislative, regulatory, and enforcement initiatives of the Department. So you look to past writings and a person's position in the past to try to get some idea of just how vigorously this person would enforce the laws—and not so much just enforce the laws but in terms of the attitude that will prevail in the Solicitor's office of over 500 attorneys.

I find disturbing some of the statements that you have made. Obviously, you appear to be a great advocate for one side of this argument, and that is fine; I have no problem with the two forces battling it out in court and that kind of thing, and you seem to be a very strong advocate for the business side of the ledger. But somewhere in that past, I am looking for some little indication that maybe that was just—that was your job—but where you have some other things that maybe weigh against that, and I am having a very hard time finding that, especially in one area that I am very concerned about, and that is the Americans with Disabilities Act.

We have fought for years to break down some of the misconceptions and to bring people with disabilities into every phase of American life, not just the workplace, but travel, entertainment, everything. With the passage of the Americans with Disabilities Act in 1990, we took that major step forward of saying this is a civil rights law. ADA is not an employment law—it is a civil rights law like any other civil rights law. But in that law, we very carefully, over a number of years, working with the business community—and I might tell you that the Chamber of Commerce supported the passage of the Americans with Disabilities Act; the only group that did not was the NFIB, the only business group out there; the U.S. Chamber of Commerce supported the passage of the Americans with Disabilities Act after we had worked out the language with them. A lot of us here were very much involved in working that out.

But I find your statements regarding the ADA to be a little confusing and not in consonance with the law. For example, in an article that you authored in 1999 in *Legal Times*, it was a story about the ADA cases—let me just read what you said in your article. You said: "The lesson is clear. Just like the prevailing defendants in these cases, employers should not hesitate to challenge agency interpretations of the ADA whenever they appear inconsistent with the law's text, its purpose, or sensible business practices." That is

your quote. I will go on. It says: "For its part, the EEOC may be well-advised to consider its more aggressive litigating positions and interpretations of the Act in order to regain credibility with the courts."

I want to ask you this. Would you agree or would you not agree that "sensible business practice" is not the test for determining whether a particular employment practice violates the ADA?

Mr. SCALIA. It is not the legal test, Senator. But what I was trying to get across in that article was that I was describing a number of U.S. Supreme Court decisions that had gone against the—

Senator HARKIN. Two.

Mr. SCALIA. [continuing]. I believe there were three, actually; Sutton, Murphy, and Kirkenberg, I believe was the third—

Senator HARKIN. You are right. There were three. I thought there were just two, but there were three.

Mr. SCALIA. [continuing]. And I was attempting to communicate to businesses which were my clients and my prospective clients that the U.S. Supreme Court had concerns with what the EEOC was saying on the ADA, and therefore, businesses should recognize that they also were within their rights to question certain EEOC interpretations.

The "sensible business practice" line is not the legal test. If it were something in the statute and consistent with the policy, it would not matter if there were a business practice that the employer wanted to maintain. However, I do believe that one of the reasons why the ADA was supported by such a broad section—and I share your view that it is an exceptionally important law—but one reason why it was supported was that the ADA was written to, for example, require that disabilities be accommodated but that they be accommodated in a reasonable way.

The Act recognizes, I would say, two things—that discrimination against the disabled is not smart business. The disabled offer a great detail to a company. And the Act also, I believe, was written with a sensitivity toward economic concerns so that, in my view, what the ADA requires is by and large something the company would want to be doing anyway.

Senator HARKIN. I personally have a bit of a problem with a couple of the U.S. Supreme Court's rulings in that regard, having been through from the start of ADA to the finish of it.

Let me ask you this. If you have epilepsy, would you fall under the provisions of the ADA? What do you think?

Mr. SCALIA. It is hard to answer on any particular medical condition, because the U.S. Supreme Court and I believe the Congress have made clear that you need to address conditions on a case-by-case basis. But epilepsy would I think often be a disability, but perhaps not always.

Senator HARKIN. If you had epilepsy, would you be considered to be disabled?

Mr. SCALIA. That is a second way that somebody can get protected under the Americans with Disabilities Act. They may not actually be physically disabled, but if somebody treats them as if they are, they would have rights. And somebody who was epileptic, even if they did not meet that test the U.S. Supreme Court has insisted

on, you are correct, could still be disabled because they were treated that way, and that is not right, either.

Senator HARKIN. Would a reasonable person consider that someone who is diagnosed as having epilepsy be considered as disabled—would a reasonable person?

Mr. SCALIA. Well, what the U.S. Supreme Court has said—and it was a 7-to-2 decision—is that you have to look at how this condition affects the person on a case-by-case basis once they are medicated.

So if the person is completely successfully medicated, it is possible that in that case, they might not be disabled. As I said, it is a case-by-case judgment. That person would still have rights, but they might not meet that U.S. Supreme Court test.

Senator HARKIN. My time has run out, but I will come back to that.

Thank you.

The CHAIRMAN. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman, and I particularly want to thank you for scheduling this hearing for today. I think it is important that we get the people in place for the administration, and I think this is a key position for the Department of Labor, and I would hope that we would expedite it after the hearing has concluded as well.

I appreciated your comments on Mr. Scalia's character, integrity, and capability in your opening remarks. Those are things that we are supposed to be looking at.

I am pleased to announce my strong support for the appointment. I know that Mr. Scalia possesses outstanding academic as well as professional credentials. One of those, the folks in Wyoming will consider to be a little bit liberal, and that is that he was editor-in-chief of the University of Chicago Law Review—but I am sure that that will not reflect badly anywhere.

Our task in conducting this hearing, of course, is to make sure that the Presidential nominee subject to confirmation is evaluated on qualifications, and I cannot envision a better-qualified choice for the position of Solicitor of Labor than the person who sits before us today. He's a person with whom I had the opportunity to have more extensive discussions on a number of the labor issues that I have been interested in as previously the chairman of the Workplace Safety and Training Subcommittee and now the ranking member of the Workplace Safety and Training Subcommittee. I think he has a great depth of understanding in those areas, and in line with the questions that have been posed today, I think it is important for us to note what the role of Solicitor of Labor is and is not.

The Solicitor is the chief legal officer of the Department of Labor. The responsibility is to enforce the laws under the Department's jurisdiction. The Solicitor is charged with advising the Department about the legality of the actions the Secretary and other individuals at the Department wish to pursue, and the Solicitor's position is not—not an ideological one nor is it a policy position. The Solicitor opines on the legality, not the policy, of proposed actions by the Department.

Mr. Chairman, I would ask that a considerably longer statement that I have prepared be made a part of the record.

The CHAIRMAN. It will be so included.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Thank you Mr. Chairman for holding this hearing today. I am pleased to announce my strong support for the appointment of Eugene Scalia to be Solicitor of Labor. Mr. Scalia possesses outstanding academic as well as professional credentials. The former Editor-in-Chief of the University of Chicago Law Review is a nationally-recognized expert in the area of employment and labor law. Furthermore, by all accounts, Mr. Scalia's character and integrity is impeccable.

Our task in conducting this hearing on Mr. Scalia's nomination, as with any Presidential nominee subject to Senate confirmation, is to evaluate whether the President's choice is, in fact, qualified for the position. As the Ranking Member of the Subcommittee on Employment, Safety and Training, I am particularly interested in the position of Solicitor of Labor. The Department of Labor plays a critical role for both the workers and businesses that make up our nation's economy. The Solicitor of Labor plays a critical role in the effective functioning of the Department.

It is difficult to envision a better qualified choice for the position of Solicitor of Labor than the person that sits before us today. As Professor Cass Sunstein from the University of Chicago writes in support of Mr. Scalia's nomination, "In terms of sheer capacity to do a fine job, he's as good a choice as can be imagined."

Mr. Scalia has received praise from distinguished lawyers and scholars across the political spectrum. The letters of support sent on behalf of Mr. Scalia attest to his keen intellectual abilities. They also attest to his independence of mind and thoughtful, balanced analysis. These are precisely the attributes that the Department, the nation's workers and the nations' businesses that make our economy grow need in a Solicitor of Labor. Professor Sunstein writes: "Gene Scalia is likely to be a terrific public servant, one who would serve the interests of the nation as a whole and American workers in particular."

An assessment of a nominee's qualifications is relative to the responsibilities of the position he or she has been selected to fill. It is therefore important to note what the role of the Solicitor of Labor is and is not.

The Solicitor is the chief legal officer of the Department of Labor. The Solicitor's responsibility is to enforce the laws under the Department's jurisdiction. The Solicitor is charged with advising the Department about the legality of the actions the Secretary and other individuals at the Department wish to pursue. The Solicitor monitors agency activities and provides the advice and opinions to ensure that the Departments agencies and employees comply with applicable laws and regulations.

The Solicitor's position is not an ideological one, nor is it a policy position. Rather, the Solicitor opines on the legality (not the policy) of proposed actions by the Department. Furthermore, an assess-

ment of science is not within the Solicitor's purview. It is an assessment of the law that is the Solicitor's responsibility.

The President has selected an exceptionally qualified individual to perform the responsibilities of the Solicitor of Labor. The President's choice should be applauded and respected. I look forward to Mr. Scalia's speedy confirmation as Solicitor so that he may begin to perform the legal services for which he is so qualified. I thank you Mr. Chairman.

Senator ENZI. Thank you.

I do appreciate the statistics that the chairman pointed out at the beginning of his remarks on the way that OSHA has improved. I would like to think that part of that improvement on the statistics on the safety of workers has come from the collaborative efforts of particularly the Senator from Massachusetts and the Senator from Minnesota and myself in working to make sure that we had a consultation part to any of the work that was done.

There are a number of things that can be involved in improving worker safety. Even a hearing such as today's will improve worker safety. It will show across the country the concern that we have for safety. I hope that we can bring out during the course of the hearing some of the things that can improve safety.

Ergonomics is one of the things that you have been questioned on here today. During the debate that led to both the Senate and the House repealing the ergonomics rule, California was used as an example, and they were shown to have a more consultative approach. Perhaps because of the debate and the mention of California, they thought it was important to bring up before their legislature the ergonomics rule that we had, and it is interesting to note that California evidently agreed with some of your writings and saw that it was not the right piece of legislation for the State of California as well, and they are usually considered leaders in safety.

I also appreciate the comments that you have made about OSHA in the home and have to mention that I think that was kind of a unanimous decision not only by OSHA but unanimously approved by the members of this committee that that would be overreaching the boundaries and putting in place enforcement requirements that would not be possible.

There have been varying numbers on the number of statutes that you will have to enforce, but the numbers that are varying depend on whether we include Executive orders and rules as well as Federal statutes. But regardless of whether they are Federal statutes or rules or Executive orders, you have been practicing labor law and have been an employment lawyer for over 8 years. During that time, have you ever opposed any of the more than 180 laws that the Department is responsible for enforcing?

Mr. SCALIA. No, I have not, Senator Enzi.

Senator ENZI. In the wake of the congressional nullification of OSHA's ergonomics rule last March, the Department of Labor is formulating a comprehensive approach to addressing ergonomics in the workplace. I recognize that you have expressed criticism of the nullified ergonomics standards. I want to note that this criticism was shared by many other lawyers practicing in the field; in fact,

this opposition was shared by, of course, as we have mentioned, a majority of both the House and the Senate.

If you are confirmed, are you in your capacity as Solicitor committed to administering or enforcing whatever approach the Department determines is the best way to deal with ergonomics hazards in the workplace?

Mr. SCALIA. Very, very much so, Senator. It would be my obligation as a lawyer and as a subordinate and public servant to the Secretary of Labor.

Senator ENZI. Thank you. I see that my time has expired.

The CHAIRMAN. Senator Wellstone?

Senator WELLSTONE. Mr. Chairman, are we going to have a second round for questioning?

The CHAIRMAN. Yes.

Senator WELLSTONE. Then, I will take the first part of my time for a statement and then hopefully get into some questions.

Mr. Chairman, as I see it, the Solicitor of Labor is not just the Department of Labor's lawyer, but is really the workers' lawyer for the whole country. He or she is responsible for enforcing the most fundamental worker protection measures on the books which have been won through decades of struggle and sometimes even with blood—the minimum wage, the 40-hour week, occupational health and safety, mine safety and health, workers' comp, family and medical leave.

The Office of Solicitor is responsible for more than 180 Federal laws that cover roughly 10 million employers and 125 million workers.

Before I get to some questions which I think are important to have on the record, let me say that I met with the nominee in my office some weeks ago, and I really enjoyed the meeting. I have a great deal of respect—I want to say this on the record before I say one other thing—I have a great deal of respect for Mr. Scalia's intelligence and his capabilities as a lawyer, and whatever happens, I wish him well. And if he is the Solicitor, I wish him well, and we will work together.

But I cannot support his nomination to this position because after reviewing his record and a number of his writings, I do not believe he is the right person for this job. His professional record of apparent antipathy toward the very laws and principles that would be his job to carry out make this, I think, a mismatch, at least in my view. Mr. Scalia seems to have been opposed throughout his career to what I see as the very mission of the Solicitor of Labor. That is why I cannot support this nominee.

The President is entitled to nominate people that he thinks are right for his administration, and I am supporting the vast majority of his selections; but as chair of the subcommittee with jurisdiction over OSHA and Fair Labor Standards, the National Labor Relations Act, Mine Safety and Health, and others, I see this nominee in a different light.

At a time when many working families face a tremendous amount of economic insecurity, I think it is really important that we have someone who will instill much more confidence that the Department of Labor is going to be on the side of working families. I do not believe that Mr. Scalia can instill that confidence.

I wanted to say that because we could not all make statements at the beginning, Mr. Chairman.

Let me make a transition to some of the questions which have led me to this conclusion. I will go back through a little bit of what was said earlier, but I will go in a different direction.

Mr. Scalia, you have written that you thought that workers liked repetitive stress injury regulation because "it reduces the pace of work"—that is a quote, that "it reduces the pace of work"—and you said that unions like such regulations because "with the pace of work reduced, more workers would be needed to maintain the level of production; consequently, union membership and dues would increase." That is all in quotes, from October 1977, "Government Ergonomic Regulation of Repetitive Stress Injuries."

During OSHA's March 20 repetitive stress injury hearings last year, there was riveting testimony from Mr. Walter Fraser, who was a poultry processing worker employed at Allen Family Foods on the Eastern Shore for 9 years. Mr. Fraser told of having to lift birds above his head at 26 birds a minute and re-hanging birds that had been scalded at 70 birds a minute for 8 to 10 hours a day. He described numerous repetitive stress disorders, some requiring surgery. He then described how his injuries affected his life. He told of always being in pain; of the difficulty of lifting his granddaughter; pain in mowing the lawn and doing all the normal things of life.

This is the basis of my opposition, Mr. Scalia, as I try to juxtapose some of what you have said and Mr. Fraser's life. Do you think Mr. Fraser's account was a ploy to get more break time? Do you think the pain that Mr. Fraser was experiencing was all in his head? Do you think the work that he did might have caused the problems he described? And is it truly your position that the union that was supporting Mr. Fraser was supporting Mr. Fraser because they were hoping that by slowing down the line, they would hire new members? And finally, does Mr. Fraser deserve to be protected from sustaining this kind of injury?

Mr. SCALIA. There are a lot of parts to that question, and I will try to keep them all in mind.

Senator WELLSTONE. I know; and take whatever you are most comfortable with.

Mr. SCALIA. First of all, I very much enjoyed meeting you several months ago, and I appreciate your taking the time to do it, and I hope I get the chance to work with you.

Senator WELLSTONE. I appreciate that.

Mr. SCALIA. The job you describe is one that has been identified as causing ergonomic difficulties. And I have written that those kinds of jobs may well cause injury, and I have urged employers to address complaints of pain. I have actually quoted a physician to the effect that patients do not lie, that they are feeling the pain.

It can be difficult sometimes to determine the exact cause, but in that case, it may well be that Mr. Fraser's job caused his problem, aggravated a problem, or otherwise contributed to the problem.

An employer with employees experiencing those kinds of conditions ought to do something, and I have written that. And certainly Mr. Fraser's safety and health ought to be protected. Again, it is

hard to know all the facts here and hard to know whether in that particular case, there was an OSHA violation or it would be under an ergonomics rule, but it is certainly something that ought to be of concern to OSHA as well as to Mr. Fraser's employer.

Senator WELLSTONE. My time is up. I will come back to it.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Collins?

Senator COLLINS. Thank you, Mr. Chairman.

Welcome, Mr. Scalia. You have been nominated for a very important position, and I think the number of members at the committee hearing this morning shows that we consider it to be a significant role. So in preparation for this hearing, I have spent considerable time not only talking with you but also reviewing your writings, looking at the letters both for and against your nomination, and I must say that I was impressed with the many people representing a wide range of ideologies who have written in support of your nomination. I do not think that would occur if you were, as some have portrayed you, against working families or anti-union or a right-wing ideologies. I do not think any of those are true based on my complete review of your writings.

I think it is important that we get some of those letters entered into the record. For example, we discussed some writings that you had written on sexual harassment, and the article that I read was a pretty provocative article. You explained to me your views on that, and I am completely satisfied, but I think as more evidence of the esteem in which you are held is a letter from Justice Ruth Bader Ginsburg which she has given permission to be included in this hearing record, and I would like to just briefly read it, since it is a short letter. It is with regard to a sexual harassment case that was before the U.S. Supreme Court.

Justice Ginsburg writes: "Dear Gene, Looking out to the courtroom audience this morning, I wished we could have invited you to present argument. All would agree, I think, that whatever we do in these cases, we should leave the forest less dense. Your article is written with refreshing clarity and style. It is informative, thought-provoking, and altogether a treat to read."

Mr. Chairman, I would ask that the letter from Justice Ginsburg be entered into the record. [Letter from Justice Ginsburg follows:] (At time of printing, the letter was not available. Documents are maintained in the files of the Committee.)

Senator COLLINS. Similarly, we have letters from legal scholars, from a legal scholar who is a former AFL-CIO lawyer, all pointing out how extremely well-qualified you are for this post and that they believe you will serve very well.

I think it is important in view of the questions that have been raised about your position on ergonomics to talk about some of your other writings. For example, you wrote—and you referred to this in response to Senator Wellstone—that: "Patients do not lie about musculoskeletal pain and discomfort; indeed, such pain is prevalent. Employers should consider a global medical protocol aimed at ensuring that such discomfort is treated, but not improperly diagnosed. Again, a company should not ignore legitimate complaints of pain and discomfort. Industry should continue to examine the re-

lationship between repetitive work and injury just as it should continue to take into account human factors and engineering.”

So my question for you is really straightforward. Do you believe that there are cases in which the work environment produces a repetitive stress syndrome such as carpal tunnel?

Mr. SCALIA. Yes, I do.

Senator COLLINS. So you are not saying that there should be no regulation in the area of ergonomics. Is what you are arguing for a science-based, carefully-drawn regulation?

Mr. SCALIA. I believe that the science requires very careful attention, and if there is to be a regulation, yes, that it must be carefully based in the science. As to whether there is to be a regulation, that is a decision that the Secretary and the OSHA Administrator would make and that the Solicitor would not be involved on a policy basis in making.

Senator COLLINS. Which brings me to my second point, and that is what your role would be at the Department. It is not your call whether there is going to be an ergonomics regulation; is that not correct?

Mr. SCALIA. That is correct, Senator.

Senator COLLINS. And indeed, Secretary Chao has indicated that she is now marshalling the information and attempting to come up with an approach to ergonomics that would not involve the 608 pages of regulations that Congress decided did not address the problem properly and thus were repealed. But your role is to provide legal advice, a legal road map, if you will, and not policy advice on what the contents of these regulations should be; is that accurate?

Mr. SCALIA. That is absolutely correct, and in fact the Secretary and her team are already fairly far down the road toward deciding precisely what course they will take on the issue of ergonomics, and those are discussions that I have not had any involvement in at all or really much knowledge about.

Senator COLLINS. Mr. Chairman, I think it would be unprecedented for us to oppose a nominee who is eminently qualified for this post simply because he opposed a 608-page regulation that does not exist because it was repealed by a bipartisan majority in both the House and the Senate. I hope we will not go down that road. I think it would be unfair and would deprive us of the services of an individual who is eminently qualified for this post and of whom a wide range of objective observers representing all sorts of ideologies have spoken so highly.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Murray—I understand Senator Edwards has to leave just before 12 to preside.

Senator MURRAY. Mr. Chairman, I just have a couple minutes, if I could just quickly ask my question, and I would be happy to yield my remaining time to Senator Edwards.

The CHAIRMAN. Fine. Go ahead.

Senator MURRAY. Let me just thank the chairman and welcome Mr. Scalia here.

I want to focus on just one area, and that is the area of sexual harassment laws. I was looking at a Harvard Journal of Law and

Public Policy article that you wrote in 1998 where you basically reject the notion of quid pro quo sexual harassment lawsuits against employers and argue that the employer should not be liable for the harasser's conduct unless the employer endorsed it.

I want you to explain to us what you meant. Do you mean that the employer should not be liable for quid pro quo sexual harassment that is perpetrated by supervisors or even executives of the company while on company time?

Mr. SCALIA. In that article, I actually very strongly condemned quid pro quo sexual harassment. I cannot remember the exact terms I used, but I think I described it as extraordinarily offensive; I think I called it perhaps the most offensive form of sexual harassment.

I was making the point that a legal test that some courts were using was confusing and in fact was unfair to plaintiffs, and that was the main point of my article.

I did talk briefly about the "strict liability" issue. I just commented in passing that I would tend to think that you would look for some evidence that managers knew about the harassment.

Senator MURRAY. I think what you said is they should only be liable when they "endorse" such improper conduct. Does that mean they have to affirmatively endorse it and say "We allow this," or do you believe they should be liable even if they only knew about it or turned a blind eye to it? How does someone "endorse" it?

Mr. SCALIA. I believe the answer is that under the law, the employer could be liable in both circumstances, and I think that is the right answer.

Senator MURRAY. Whether they endorse it or not?

Mr. SCALIA. That is right. If they affirmatively say that is okay, or if they know and do nothing, I believe that under the law they can be liable, and I think they should be.

Senator MURRAY. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Edwards?

Senator EDWARDS. Thank you very much, Mr. Chairman, and I thank my colleagues.

Good morning, Mr. Scalia.

Mr. SCALIA. Good morning.

Senator EDWARDS. Mr. Scalia, it is clear to me from having reviewed all the materials about your background—and I do not think you and I have met before, if I am not mistaken—that you have a great deal of skill, training, legal acumen, and you have been a very good lawyer for employers.

My concern is that in the position that you have been nominated for, you will have the responsibility of being a lawyer for the Nation's employees, among other things, and I am concerned based on all the things that I have read. I think there are legitimate arguments about a number of these issues that you have been asked about this morning on both sides. But my concern is finding in your record as I have looked at it what I think is a necessary empathy for workers in order to adequately and properly represent them.

As I am sure you know, in the OSHA statute, among others which you would be responsible for helping to enforce, there is no private cause of action, so the Solicitor is the person responsible for

determining whether there is going to be a case brought on behalf of employees against whomever is involved.

Let me ask you a couple of factual questions. Can you tell me how many times over the years, approximately, you have represented corporations and employers in disputes with either Government agencies, unions, or employees?

Mr. SCALIA. I do not have a number.

Senator EDWARDS. Can you give me some idea of how many times, approximately?

Mr. SCALIA. I am sorry, Senator, I would be guessing. But what I would emphasize is that although I handled a number of cases for employers, a large part of my practice also was to counsel employers, and in that capacity, I felt that I had a great obligation both to the law, to make sure these people knew what the law was, and also to the employees.

I think it is not often appreciated that a lawyer who represents a company in labor-management type issues often gets in a bit of an argument with maybe a manager and says, "You cannot do that." I filled that role a lot, Senator. I spent a lot of time on the phone saying, "I am sorry, you just cannot let that person go."

Senator EDWARDS. Can you tell me what percentage of the time that you spent in the practice of law was devoted to representing and counseling employers as opposed to employees?

Mr. SCALIA. I represented employees very seldom; it was not regularly part of my practice. I did it—

Senator EDWARDS. How many times did you actually represent employees in disputes against employers or corporations or corporate associations?

Mr. SCALIA. There are two matters that I can recall that did not go to litigation, but they were counseling matters where I helped people—in one instance, a pro bono basis for a woman with a hearing difficulty—but in litigation, I do not believe I had cases.

Senator EDWARDS. OK. So on two different occasions over the—how many years have you practiced law now—

Mr. SCALIA. I was in private practice for, I believe, 10 years.

Senator EDWARDS. [continuing]. Ten years. So for that 10 years, you had two cases where you represented employees in some capacity, and the remainder of the time you were representing employers, corporations, etc; is that correct?

Mr. SCALIA. I was representing those employers or entities in one capacity or another. As I say, it might have been to counsel them on their obligations; it might have been in a nonemployment matter in some circumstances.

Senator EDWARDS. Would you agree that one of your responsibilities in this position that you have been nominated for would be to represent the laborers, the working people around America?

Mr. SCALIA. My responsibility would be to represent the Government of the United States and enforce the laws, which I would do vigorously. In that capacity, I would be acting to vindicate the rights of working people in many kinds of cases. They would not technically be my client, so I would not technically represent them, but I would enforce those laws vigorously to their benefit.

Senator EDWARDS. OK. You were asked by Senator Wellstone about a particular employee who had testified about hanging chick-

ens and working at a poultry plant. Down in the part of the country where I am from, my father worked in a cotton mill most of his life, and my mother worked in a cotton mill for some part of her life. Just out of curiosity, have you yourself ever had any personal experience working in a manufacturing plant or the kind of poultry facility that Senator Wellstone was asking about?

Mr. SCALIA. No, I have not worked in a facility like that.

Senator EDWARDS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator SESSIONS?

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Scalia, I want to thank you, and I know that Senator Wellstone and Senator Edwards were asking about whom you represent, but as a former United States Attorney, you do represent the Government and the laws that the Congress passes, and your responsibility is to enforce them equally and properly and fairly, and you well-stated that, and I think that is important for us to remember. We want an objective counsel as counsel to the Secretary of Labor.

Your background is just marvelous, Mr. Scalia. You received your bachelor's degree from the University of Virginia, one of the great universities in the world, and your law degree from the University of Chicago, one of the great law schools in all the world. You were editor-in-chief of the law review at the University of Chicago which, for those who do not know, is the most prestigious position of any graduating senior, and to do that at a great law school like Chicago is an extraordinary achievement and one in which I think you can take great pride. You have also spent your career with Gibson, Dunn & Crutcher, one of the great law firms in America, and you have spent most of your career doing labor work, representing the clients of Gibson, Dunn & Crutcher with fidelity, with objectiveness and fairness. I have not heard anyone who has litigated against you come forward and say that you are dishonest, unfair, or unobjective.

I think you have an extraordinary background, and for the Secretary of Labor to reach out for someone of your quality speaks well for her. I think she is entitled to one of the best lawyers in the world to represent her, and I think you are one of those, and I know you will give your level best to advise her according to the law as your best judgment helps you find it; is that correct?

Mr. SCALIA. I would; that would be my obligation.

Senator SESSIONS. And with regard to the regulations that are in force in law and that may become law in the future, will you give her your best advice on how to fairly and objectively enforce those laws?

Mr. SCALIA. Yes, I would.

Senator SESSIONS. And if the U.S. Supreme Court rules in a certain way, whether you agree with it or whether you do not agree with it, will you advise her on how to enforce the rulings of the U.S. Supreme Court and other courts as appropriate?

Mr. SCALIA. Yes, I would, Senator.

Senator SESSIONS. I think that that is important.

The article that you were asked about in the Wall Street Journal was a reaction to this OSHA advisory to go far beyond anything we

have seen before to regulate homes, to have OSHA inspectors apparently go into homes. It resulted in a real reaction across the board, as I recall it, and your article was written as part of that reaction to that proposed advisory, or that advisory; is that correct?

Mr. SCALIA. That is correct, yes.

Senator SESSIONS. And that advisory was withdrawn by OSHA itself, was it not?

Mr. SCALIA. That is correct.

Senator SESSIONS. And to my knowledge, not a single member of this committee and not a single person in the U.S. Senate has ever objected to the withdrawal of that advisory, which in my view went far beyond a legitimate action of OSHA. So I do not think that your article, which was aggressive and to the point, was extreme, but it reflected the considered opinion of the Senate and even the OSHA leadership when the issue was raised to them.

Mr. Scalia, you have written about some of these regulations, and as a former Federal prosecutor, I have had to enforce laws and regulations myself. Let me ask you this. Is your concern out of the fact that you know they will be enforced; you have seen how rules and regulations are enforced in the legal world, and that they need to be good regulations, and if they are not, bad things happen?

Mr. SCALIA. I have a great deal of respect in the rule of law and employers complying with the laws on the books, and for that reason, I think it is important that we take great care in the laws we formulate.

Senator SESSIONS. And you have had to advise clients to enforce laws I am sure on occasion which did not make much good sense to them; is that right?

Mr. SCALIA. There were certainly times when clients did not quite get why they needed to do the kinds of things that I advised them legally they had to do, but I told them it was the law.

Senator SESSIONS. I think you are going to find in Secretary Chao that you have a tremendous leader. Just this past week, I traveled with her to Brookwood, AL, where we had 13 coal miners killed in a mining accident, the worst since 1984. Ten of them died responding to help three others—gave their lives for their brother miners. We had a marvelous memorial service that finished around 8:30, and Secretary Chao had a plane out of Birmingham at 6 a.m. the next morning. Despite that, she went to the union hall and spent 2 hours visiting with everyone there, not leaving until after 10 o'clock.

I think she is going to provide great leadership and concern for the working men and women of America, and I think it is going to be wonderful to have someone of your caliber help her enforce the laws effectively.

Mr. Chairman, I would just note a couple of things. Cass Sunstein, one of the more notable liberal professors in America at the University of Chicago Law School, recently wrote: "I know Gene well. I think he is an excellent choice, first-rate, not at all an ideologue. Gene was a sensational student at Chicago, one of our very best. He was elected editor-in-chief of the Law Review not only because he is so smart but also, and maybe even more so, because he is a wonderful human being."

He volunteered as an unpaid professor to help the DC. Law School here when they were having financial troubles, and Dean Robinson wrote: "I found Gene Scalia to be a dedicated legal scholar who looked past labels to make a more thoughtful judgment, took a balanced, nonideological approach to his teaching, and was respectful to his students."

William Coleman, former President of the NAACP Legal Defense and Education Fund, wrote to this committee saying: "I have every reason to believe that his performance at the end will place him among the best lawyers who have ever held that important position."

I would agree. I think this nominee is extraordinarily qualified. He has a history of balance and commitment to law and will be a great asset to the Secretary of Labor.

It is important that we move forward with it, and I thank the chairman for allowing us to have this hearing today.

The CHAIRMAN. Thank you very much.

Senator Reed?

Senator REED. Thank you very much, Mr. Chairman.

Thank you, Mr. Scalia, for joining us today.

It seems from reviewing your writings and listening to your responses today that you do recognize that there are many wrongs in the workplace, but you do not seem to see many regulatory responses that the Government can take effectively to correct those wrongs; and that is a disturbing point for someone who is going to be proposed as Solicitor General for the Department of Labor.

In response to questions from Senator Collins about the proposed ergonomics rule, you left the impression, I believe, that you would have a very limited role in that. Is that the correct impression that you would like to leave with the committee as the Solicitor General?

Mr. SCALIA. The Solicitor has a defined role. It is an important role, but it is a role dedicated toward providing legal advice. So for example, in a rulemaking, the Solicitor would say there is a range of legal options before the Secretary, before OSHA, and here is the sustainability in court of the different courses of action you might take.

It is not the Solicitor's job, however, to opine on medical issues, scientific issues. That expertise lies elsewhere in the Department. So yes, the role would be limited in that respect.

Second, I believe I mentioned earlier in the response you were referring to that the Secretary's decision on ergonomics particularly was already one that was in the latter stages, close to a decision, and that I had not been involved in that, actually, at all.

Senator REED. So as Solicitor, would you accept the premise that the science was junk science, or would you see the science as very valid, pointing to the need for a regulation?

Mr. SCALIA. I have never said that all the ergonomics science is junk science, and I do not think it is. Whether it supports a regulation, again, the evaluation of that scientific evidence is something that falls principally with the experts within OSHA.

Senator REED. So you could conceivably recommend to the Secretary that no regulation is required as a lawyer, because the sci-

entific evidence has not been conclusive to you, even though you do not present the scientific evidence.

Mr. SCALIA. As I understand the working of the Department, it is OSHA and personnel within OSHA who would take the lead in assessing the scientific and medical evidence. I cannot imagine myself if I were confirmed as Solicitor reading individual studies and calling up the OSHA Administrator and saying, "Here is what the science says."

At some point, a legal judgment is necessary based on recommendations reached by OSHA on whether that rule is sustainable, and as I said, I do not see the Solicitor's office as being an on/off switch but rather as presenting the range of legal options and the sustainability of them.

Senator REED. I think you have a very circumscribed view of what the Solicitor does as the key advisor to the Secretary of Labor—not just on this issue of ergonomics but on a range of issues, making judgments about not just the sustainability in court but whether or not this is an appropriate response of the Government to a real problem. And if you are going into this office with that kind of a circumscribed view, first, I think it is rather artificial, and it comes to the whole essence, which is one of the difficult issues of public policy—where does policy end and the law begin—and I suspect it is almost impossible to find out in most cases.

So in your role, you are going to make key value judgments about what is important, not just procedurally about where do we file this case and what would happen if someone sued us, what court would we be in, and if you do not appreciate that and evidence that in your remarks today, then I just think you are missing a major point of what you are going to be doing.

It gets back also, I think, not just to the skills you bring to the job but to the spirit you bring to the job, whether you are going to be the lawyer for people who work every day and need someone to look out for them, or whether you are going to be the lawyer for the Government or those special interests which influence the Government. Many times, they are not the working people who need the help of the Department of Labor.

Let me turn to another point. With respect to your writing on quid pro quo sexual harassment, you seem to say that an employer should only be directly liable if they endorse or ratify the act in question. Again, is that a fair statement of your view?

Mr. SCALIA. I do not recall exactly what I wrote on that. I believe that what you are referring to, Senator, is maybe a sentence or two at the very end of the article where I think I said some see it this way, some see it that way, I probably see it this way, but that is not important to my article, and I believe that is in short how I dealt with it.

This—

Senator REED. Again—excuse me. Go ahead, please.

Mr. SCALIA. This area of the law is a little bit difficult right now; in light of the U.S. Supreme Court decisions I believe from 1998, the law is a little bit unclear. So it is hard for me to say this is the legal answer right now. But—

Senator REED. Why don't you give me your answer?

Mr. SCALIA. As a policy matter?

Senator REED. As a legal matter, as a policy matter, as matter of what the law should be—any way you want to describe it. Should an employer be liable only if that employer endorses or ratifies the act in question.

Mr. SCALIA. In this article, I wrote very strongly against sexual harassment—

Senator REED. That is not my question, Mr. Scalia.

Mr. SCALIA. [continuing]. And that was the message I was communicating.

As to employer liability, I would not limit it to cases where there has been endorsement or ratification. If there is knowledge, and it is not fixed, that is a basis for liability, I believe, under the law, and I think that is how it should be; it ought to be stopped.

Senator REED. Does that represent a change from the view you took even peripherally in this article of 1998, just about 3 years ago?

Mr. SCALIA. I am sorry, I cannot answer that, Senator, because my article was not about that issue. I may have made an observation in passing, but I just did not have firm thoughts on that point.

Senator REED. Again, it seems to me that someone who is crafting an article for a Law Review through the various editorial processes—and you were the editor of a prestigious law journal, as Senator Sessions pointed out—that there is not a lot of throwaway language in those articles; there is not a lot of sort of “Let me just say off the cuff...” And in preparation for this hearing, I would assume that you would at least have a grasp on every point of the article, but apparently, you do not.

Mr. SCALIA. I try to write carefully, but again, this was not a point that was the subject of my article, and I do think, again, if an employer has knowledge of sexual harassment, it ought to be stopped, because that is the right thing to do and because as I understand it, that is the law. What I said on this at the time, I am afraid I do not recall.

Senator REED. Thank you very much, Mr. Scalia.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

We will begin a second round.

As you have obviously concluded, the principal questions that people have in mind, at least in one important area, are on ergonomics and the whole history that you have been able to not only represent your clients but also in your writings and whether you have been sufficiently understanding of what the interests of workers and their health needs are in the light of very substantial and I think overwhelming medical science in NIOSH and the National Academy of Sciences. I find myself that you come up short.

Reference was made earlier to junk science and to the U.S. Supreme Court’s use of that term, but as I understand it, that dealt not with health-related issues but with issues of product liability.

These are the other words you used—and this was in the year 2000—“The science of ergonomics is notoriously doubt-ridden and controversial.” That was in the Policy Analysis that the CATO Institute made in 2000.

In another, an article in the San Francisco Daily Journal—this is not representing a client—“no agency should be permitted to im-

pose on the entire American economy a costly rule premised on a science so mysterious that the agency itself cannot fathom it.” This was in the *San Francisco Daily Journal* in July. “This vague and subjective rule would afford little benefit to workers because it is based on thoroughly unreliable science.”

Those statements and comments were all made after the publication of the National Academy of Sciences and NIOSH, and they are enormously troublesome in the sense of whether you can really separate your own views, because the articles that I have referred to are not representing a client, they are your own conclusions.

Let me ask a question. You have said in your written statement that as Solicitor General, you would only be providing legal advice to the Secretary on ergonomics, not policy advice or scientific advice. I find it difficult to believe that legal advice can be easily disentangled from policy and science.

For example, the Secretary has said that she is developing a comprehensive approach to ergonomics that may include a new regulation. Before it can issue a regulation, OSHA must demonstrate that the hazard in question poses a significant risk of harm, and the standard will reduce that risk.

You are intimately familiar with the record of evidence on ergonomics, including the scientific evidence, and I want to know, as the Department of Labor’s chief lawyer, what would be your legal advice to Secretary Chao on whether there is a legal basis to support an ergonomics regulation.

Mr. SCALIA. Mr. Chairman, unfortunately, I am not particularly familiar with the record evidence that was put in in the last rule-making; it was so vast that I have not reviewed it to any sufficient degree to State whether a rule is supported.

One thing I will say is that in litigation that I was involved in in California over the California ergonomics rule, in that litigation, I did not raise a “significant risk” challenge to California rule. So at least in that one circumstance, in view of the circumstances in that one regulation, I was not involved in arguing that significant risk had not been shown.

The CHAIRMAN. Well, I am really more surprised at this answer than any you have given earlier, quite frankly. You have been writing about this now for 6 or 7 years. You have been one of the most prolific writers on this whole issue., and given the fact that you have written about this and represented different clients, you must have in your representation of different clients understood, obviously, what the other side was going to say. You must have looked at the opposition and the people who were taking a different position.

This is a very, very simple question. This is a very, very simple question, and if you cannot answer that question—if you cannot answer that question, you have lost me; you have absolutely lost me. That might not be important, but that is beyond belief in terms of the fact that you have been writing about this for 6 or 7 years and have been one of the most prolific writers. You have written about it a great deal and represented clients, and the question is, given all the evidence to meet these particular requirements, the issue is does it pose a significant risk of harm and that the stand-

ard will reduce the risk, and you say you cannot give us an answer on that because you are not familiar with the evidence out there.

Let me go on to another issue.

Mr. SCALIA. If I could answer that quickly, Mr. Chairman.

The CHAIRMAN. Yes.

Mr. SCALIA. Certainly what you think is important, and what I meant was that the record, the evidence that was assembled before OSHA, I do not know what that record evidence is.

As to what is out there in the larger scientific community, I do not know the scientific answers, and I have never said that I do, because there is so much uncertainty among the leading experts. And I think there has been an effort—I think the recent NAS report reflects it—to come to consensus and agreement, and I think perhaps there has been progress, but I have found it—I have never tried to say this is the answer or that is the answer. I have instead pointed to what scientists themselves are saying about how things can be difficult in this area.

The CHAIRMAN. Well, let me go to another area. In 1999, OSHA proposed regulations to make clear that an employer's legal duty to provide a safe workplace under the Occupational Safety and Health Act includes a duty to pay for safety equipment such as gloves, goggles, and other personal safeguards when safety equipment is required by an OSHA standard. The rulemaking was needed because of a decision by the Occupational Safety and Health Review Commission which said that the standard requiring employers to provide safety equipment did not necessarily mean the employer had to pay for the equipment.

OSHA's proposed rule is still pending in OSHA. Because of the Review Commission's decision, we currently have a situation where employers are not required to pay for many of the basic kinds of safety equipment even though the equipment is required by OSHA standards. Many employers do in fact pay for safety equipment, but some refuse to pay and instead make the workers pay. This is particularly true in low-wage industries where workers are unorganized. For example, in the poultry industry, some employers require workers to pay for mesh gloves and what they call arm guards needed to protect against cuts from sharp knives. These workers make \$7 an hour. The cost of one mesh glove is \$65, and the employer deducts the cost of the equipment from the worker's pay check.

You co-authored comments on OSHA's proposed rule on behalf of your client, UPS, and those comments opposed the rule and urged OSHA to withdraw the rule in its entirety. The comment argued that the rule was "a naked allocation of economic benefits and is not a health or safety standard" and consequently was "beyond OSHA's mandate". The comment actually said the rule could be harmful to worker protections.

Now, I recognize you wrote those comments for a client; I would like to know to what extent those comments reflect your personal views.

Mr. SCALIA. It was written for a client, Senator, and in fact I notice that I was one of five lawyers who worked on that document. I did not have particularly great involvement in it.

I cannot say that when I wrote the parts of those comments that I worked on that I was advancing personal views. I do not know the law in that area particularly well and did not have any of my own personal feelings about that issue.

The CHAIRMAN. So do you believe that OSHA has the authority to issue the standards that require the use of safety equipment like respirators, mesh gloves, goggles, to protect workers from workplace health hazards?

Mr. SCALIA. I do not know the law particularly well in that area. I would be surprised if it did not have the authority to some extent.

The CHAIRMAN. Well, you see, in your opinion about home offices, this is what you said—or in fact, didn't you argue against OSHA having jurisdiction over home offices? You said: "It is a basic principle of OSHA law that employers must bear the cost of eliminating unsafe work conditions." You said that in the Wall Street Journal. So you were willing to say it there, and I am asking you why did you know it then, and you do not know it now.

Mr. SCALIA. I was talking about what are called "engineering controls" when employers change the equipment that employees are using, or that sort of change, and I did not have in mind personal protective equipment.

The CHAIRMAN. Mesh gloves for poultry, the kinds of things which are the notorious in regard to health and safety—you do not know whether the authority is there, but you do understand with regard to more technical questions on ventilation or whatever—what else were you mentioning—engineering.

Mr. SCALIA. Engineering controls; changing the equipment, machines.

The CHAIRMAN. So they do in engineering controls, but not with regard to the others.

My time is up.

Senator GREGG. I think your answer was you did not know the answer.

Mr. SCALIA. That is correct.

Senator GREGG. Which is a reasonable answer, and I think very appropriate for this hearing, and I regret that that will be held against you.

In fact, so far from the evidence presented from the other side of the aisle, it appears that the basic detriments that might stand in the way of your being appointed to this position are, one, that you felt there were problems with an OSHA regulation which the Congress felt was so bad it rejected it in a bipartisan vote in both Houses. That seems to be the number one reason why you are being opposed for this nomination; second, that you are a lawyer, and you represented clients. Well, my goodness, what a surprise. You are a lawyer, and you represented clients.

Mr. SCALIA. I had mouths to feed, Senator.

Senator GREGG. In fact I was very surprised to hear the Senator from North Carolina, who is an outstanding lawyer, make the representation that because you were a lawyer and represented clients, you could not change sides as a lawyer and represent the other clients. When I was in law school, that was something we were expected to be able to do. Maybe the treatment of the bar has changed; maybe you can only represent one side these days. My ex-

pectation is that you would be a heck of an attorney for whatever side you decided to join. That is the third reason. The first was that you could not answer a question.

And the fourth reason appears to be that you—I am not sure there is a fourth reason.

So let us return to the cause celebre, ergonomics, and this issue of whether junk science applied to ergonomics. The representation was that this was applied to something other than ergonomics. Wasn't junk science applied in the three OSHA cases to those questions involving ergonomics?

Mr. SCALIA. That is correct. The test that is popularly known as the junk science test was formulated elsewhere.

Senator GREGG. But I mean it has not been limited to—I think it was represented that it came out of a case that was decided on some other issue than ergonomics, which is reasonable, but it has been applied by courts in the ergonomics area—is that not correct?

Mr. SCALIA. That is correct.

Senator GREGG. There was also, as I understood it, a concern—and I guess it came from Senator Reed—that you did not think that there was a regulatory response to many of these issues. Was that a correct representation of your view? Essentially, he said that you do not believe in regulations. Do you believe that the Department of Labor has a legitimate regulatory role?

Mr. SCALIA. I believe it has an extraordinarily important regulatory role, and there is not an OSHA rule on the books that I have opposed or that I have an objection to.

Senator GREGG. And you have not opposed any of the rules, of which there are 140, according to—I think it was the Senator from Wyoming who noted that there are 140 different rules—is that all—laws—I knew there must be more rules; that is a ridiculously small number for a Federal agency—any of the laws, 140 laws. You have not opposed those, and I presume there is a lot of rulemaking authority under those laws.

Mr. SCALIA. That is correct.

Senator GREGG. So rather than being someone who opposes regulatory activity, you have actually been quite supportive of the initiatives.

Mr. SCALIA. I think the Government has a very important role to play in ensuring worker well-being, including their safety and health.

Senator GREGG. And there was the further representation that you were not going to be good at this job because you were going to be the lawyer for the Government. Is the Solicitor the lawyer for the Government?

Mr. SCALIA. That is correct.

Senator GREGG. Isn't the Solicitor always the lawyer for the Government?

Mr. SCALIA. That is correct.

Senator GREGG. So I think that that representation has a few holes in the bucket, doesn't it? It is a little hard to carry that water.

I think your answers have been exceptional, they have been forthright, and so far, I have not heard any representations which in any way would undermine the views expressed by some very

substantive people who were quoted by the Senator from Alabama, one of whom happens to be in the room today—Mr. Coleman—that you would do a heck of a job in this position. I am looking forward to working with you, and I just cannot see how your nomination could be opposed on the basis of the representations made here today.

Thank you.

Mr. SCALIA. Thank you. I would look forward to working with you and all the members of this committee if I am confirmed.

The CHAIRMAN. Senator Wellstone?

Senator WELLSTONE. Thank you, Mr. Chairman.

Thank you, Mr. Scalia. I appreciate your patience for a long hearing.

Just to build on what Senator Gregg said, I do not really think it is a question of whether or not you can switch sides, and it is certainly not a question of whether you are an able lawyer, that is the basis of my saying that I cannot support you. I think it is more a question of whether or not there is anything in your background and your professional work history that suggests that you would be on the side of workers, that you would have the sensitivity and the compassion.

I gave the example of the poultry worker, Mr. Fraser, and then we ran out of time. The reason I raised that question is because I am trying to look at your view of the world, and then I am trying to look at Mr. Fraser's world, the worker's world, and I am trying to see how someone like Mr. Fraser, a poultry worker, gets the protection and gets the relief.

I have here a summary of a lot of the cases that you have litigated and articles that you have written—it goes on for any number of pages—and I see not just opposition, I say to my colleagues, to the regulation, to the OSHA standard, I see opposition to guidelines, I see opposition to general duty enforcement. I just do not see anything in your past, in your work as a lawyer and what you have written, that provides much help for Mr. Fraser. That is really what I think this hearing is about, which leads me to a question.

We know—and you have said, Look, I was a lawyer, and this is what I was doing—we know of your opposition to repetitive stress injury rules. Have you ever filed comments supporting a worker protection regulation?

Mr. SCALIA. Yes, I have, and I provided congressional testimony also on the recordkeeping rule, which I believe in the comments I filed but also in the testimony I gave, I said was a very important rule; I said it was good that OSHA was doing it so that employers could know where the injuries are occurring, so employees could, and so OSHA could.

Senator WELLSTONE. This was—could you go over that for me again, the specific reference of the comments that you are talking about? This was in which testimony or what case?

Mr. SCALIA. It was on the recordkeeping rule which OSHA finalized. But I will concede, Senator, that when you are representing the regulated community, it is relatively unusual to file comments asking for regulation; but that was one that in a personal capacity also I supported.

Senator WELLSTONE. And I will concede that when you are representing such a community, it is rare, and I note not your tone of sarcasm, which I appreciate, but more the twinkle in your eye as you say that to me. But again, I think that is part of the question of looking at the record and trying to figure out, given all the positions you have taken and your very career, how that squares with what I think is the mission of the Solicitor of Labor.

Now, if I have a little bit more time—you talked about this article that you wrote for the Harvard Journal of Law and Public Policy, and you said this was an article where you expressed your respect, or you wrote about your respect for unions. I think that was your reference—am I correct?

Mr. SCALIA. Yes.

Senator WELLSTONE. It is my understanding that this is also an article where you argue for exempting unions from programmed OSHA inspections and from Fair Labor Standard overtime requirements. If that is the case—and I want to ask you if that is the case—then, the effect of the recommendation would be to disadvantage union members, causing them to bargain for matters for which all other workers would have—is that correct? Did you also in that article argue for exempting unions from programmed OSHA inspections and from FLSA overtime requirements?

Mr. SCALIA. As you say, this was a law review article. It was written to suggest issues for discussion and consideration. The general point that I was making was that unions do a very good job in many instances of helping their members in a sense of regulating the workplace, and that is why we have the National Labor Relations Act and protect the right to unionize.

And I said that consideration should be given in some circumstances to letting unions negotiate and perhaps alter the degree of their Federal coverage if they thought it was in their own interest.

Senator WELLSTONE. So you were not arguing that you wanted to exempt unions from the OSHA inspections or from FLSA overtime requirements; you were saying that if unions themselves sought such an exemption—is that correct?

Mr. SCALIA. I think on the inspections, what I did was analogize to an inspection program during the Clinton Administration which had said that if you have a safety program that includes employees, there would not be inspection, and I said, well, what if you have a union that is affected in that area. I think on that point, I may not have said it was a matter of union negotiation, but on the overtime, I believe what I suggested was that it would be a matter of union negotiation.

I intended that article, as I say, and as is sort of clear from many passages in it, in a spirit of bipartisanship and to start discussion, but I did not—it was a little bit of a think piece, and I did not intend it to be a manifesto but rather as the start of a discussion.

Senator WELLSTONE. Well, I am out of time, and I am not trying to score debate points with you. You are, I think everybody knows, very able. But I just want to point out that I think—I could be wrong, and I am going to have to go back and look at every word—you were talking about something where you paid your respect for unions. My understanding, though, and from what I read, is that

you then go on and argue for exempting unions from OSHA and from FLSA, and it does not seem like—I have not heard unions really calling for that or asking for that. Unless I read this the wrong way, it hardly seems like a piece where you are really showing respect for unions. It seems to go in the opposite direction. The reason I mention this is that it is in the context of all of your writings, and of the cases. My question is not whether you can shift sides; my question is whether or not you can be an attorney, a Solicitor, for workers in this country. That is my question.

I am out of time.

The CHAIRMAN. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman.

Mr. Chairman, could I ask unanimous consent that a letter from some previous Solicitors of Labor in a number of administrations be made a part of the record?

The CHAIRMAN. It will be so included.

[Letter follows:]

July 19, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

Hon. JUDD GREGG,
U.S. Senate,
Washington, D.C. 20510.

DEAR CHAIRMAN KENNEDY AND SENATOR GREGG: We served as Solicitor of Labor in the administrations of Presidents Nixon, Ford, Reagan, George H.W. Bush, and Clinton. We are writing to urge that the Senate Committee on Health, Education, Labor, and Pensions proceed expeditiously with the nomination of the current Solicitor nominee, Eugene Scalia.

The uniqueness and importance of the Solicitor is reflected by the Department's structure, which places him as the third-ranking official, as you are aware. His involvement is crucial to the Department's performance of its important mission - the enforcement of the labor and employment laws administered by the Department the development of legally compliant policy initiatives, and the issuance of regulations in furtherance of those laws. While it is possible for the Department to function without a confirmed Solicitor for short periods of time, the absence of a Solicitor inevitably causes significant interference with the Department's operation and most important is detrimental to those who are protected by our Nation's labor laws. Without a Solicitor the Department has more difficulty making important litigation decisions; important enforcement initiatives may be delayed as a consequence, and employment law violations may go unaddressed. The absence of a confirmed Solicitor also makes it harder for the Department to make significant regulatory decisions, as the Secretary and other senior staff await legal review by the person the President has nominated for that task. Finally, the institution of the Office of the Solicitor, which is the second largest cabinet-level legal office, it self suffers when the Solicitor cannot personally participate in the Department's deliberations, and functions ordinarily performed by the Solicitor are assumed by other departmental personnel.

Eugene Scalia was nominated to be Solicitor in April. We recognize that some have raised concerns with his nomination. We believe, however, that the best course

at this time is to have those concerns addressed in a confirmation hearing, so that the Office of the Solicitor may be filled as soon as practicable. Thank you.

HENRY L. SOLANO,
Solicitor of Labor under President Clinton.

THOMAS S. WILLIAMSON,
Solicitor of Labor under President Clinton.

ROBERT P. DAVIS,
Solicitor of Labor under President George H.W. Bush.

GEORGE R. SALEM,
Solicitor of Labor under President Reagan.

WILLIAM J. KILBERG, P.C.
Solicitor of Labor under Presidents Nixon, Ford.

Senator ENZI. Thank you. It does make a point on the urgency of getting somebody into this position. It also makes a point of the important litigation decisions, the important enforcement initiatives, and the employment law violations that could go unaddressed with this position being unfilled and asking, of course, for a review, and again, I appreciate having this review.

I had my staff do some checking—and I have outstanding staff, but they may have missed something—and I could not find where we had had anything except pro forma sorts of hearings on Solicitor Generals before, so I was not able to find what kinds of questions were asked of a Solicitor General before.

I suspect that if a full hearing were held, perhaps our side would have asked a question about how many employers the Solicitor General represented if he were from the other side. I suspect that perhaps we might have even asked a question about what kinds of businesses they had run. I am not sure that that is really appropriate to the position that you are asking about, but I will mention something on recordkeeping, and that is that I really share your opinions on the recordkeeping—and I may be the only one in the Senate who has filled out the OSHA accident forms. I was an accountant, and that was one of the jobs that was given to me, and I have got to say that that was the most worthless piece of crap I ever did. [Laughter.] There is no value to filling out that form, so when I got here, I was really excited to be able to find out what happened to it. Nothing happens to it. The biggest use for it, of course, is that in January, the employer has to post it on the board to show his employees what accidents happened. And if that cannot be improved on, OSHA needs to find another job. Just posting it does not do any good. Just posting it in January is probably the worst time to post it. Encouraging employers to not only keep track of what the accidents are but to keep track of the near misses and let their employees know what could have happened and how to avoid it would be much more useful.

So I appreciate your point on the recordkeeping. I also appreciate the point that when you represented a client, you were one-sided. Although I am not a lawyer, it has always been my understanding that that is how the law is supposed to work—when you pick a client and you represent them, you are supposed to represent their side. You are not supposed to make the case for the other side. So I can understand how some of these statements that you made

while representing a client might be more one-sided than you might otherwise feel.

To get to the questions, one of the reasons why that ergonomics effort did not pass was because of the process that the OSHA department used. I would be interested in knowing if you have a say in how the process will work. What I am referring to specifically is that people were paid to testify. Then, they were brought in to practice testifying. Then, their testimony was rewritten by the Department who, it was always my thought, was supposed to be unbiased in the situation. And then, worst of all, they were paid to rip apart the testimony of the people who paid their own way to testify.

Would that be a job of the Solicitor General to advise in which instances things can be paid and what would be correct opportunities for payment?

Mr. SCALIA. Yes, that would be a function performed by the Solicitor's office.

Senator ENZI. Another thing that bothered me and evidently a lot of other Senators and House Members was that the comments—and there were about 78 feet of them, so I can understand why you have not read them yet—were reviewed in less than a month and then not reflected in the final document. In fact, the final document went the opposite way from the majority of the comments.

The reason I am curious about this and interested in this is I think we could start a whole new trend in rules if we allow a department to put up what might be a “milktoast rule” and get unanimous comment in favor of it and then reflect a much tougher line when the final rule comes out. Is that something that would come under your jurisdiction?

Mr. SCALIA. That is correct. Compliance with the Administrative Procedures Act is important to rulemakings, and it is those kinds of issues where the Solicitor's office would have its principal involvement as I understand it.

Senator ENZI. Do you have any difficulties with these things that I have mentioned? Are they things that—well, I will not even ask the question because—

Mr. SCALIA. Well, I—I guess I should not answer the question if you did not ask it.

Senator ENZI. I will go ahead and ask the question; you go ahead and answer it.

Senator SESSIONS. Do you want legal advice on that? [Laughter.]

Mr. SCALIA. There were difficulties in getting the task done in the time that was allotted for it during the last rulemaking. My impression was that OSHA and the Solicitor's office worked exceptionally hard, but it was an awful lot of work to get done in the period that we were talking about.

Senator ENZI. Would you work to be sure that the testimony taken is unbiased from the Department's standpoint?

Mr. SCALIA. I think it is the Department's responsibility to enable a spectrum of views to be expressed and to establish procedures that allow that in an unbiased manner, and I think it is the Department's responsibility to review those comments and the testimony in an unbiased fashion.

Senator ENZI. Just very quickly and without an answer, but I will submit this in writing to get an answer—I would like to have your comments about what your position would be on making a rule tougher after the hearing was held and whether you as Solicitor would have the right to have them do another hearing after that time.

I will submit that in writing.

[Question and response follow:]

[At time of printing, the Question and Response was not available. Documents are maintained in the files of the Committee.]

The CHAIRMAN. Senator Sessions?

Senator SESSIONS. Thank you, Mr. Chairman.

You know, regulations are a part of life. I think our big concern is if we have a regulation that imposes a cost but does not produce a benefit, then we ought to look at that with some concern.

I have filed a number of cases on behalf of workers against entities in the last 10 or 12 years in private practice. I remember two on overtime, one against a business and one against a union. The union did not properly compute the overtime, and an employee came to me, and we won both of those lawsuits.

I think that what you are saying, Mr. Scalia, is that you believe in the law, you believe in the rule of law, and if the overtime is necessary or the safety rule is clear, you will seek in every way possible to enforce that rule of law or court case. Is that correct?

Mr. SCALIA. Absolutely.

Senator SESSIONS. Whether you agree with it or not.

Mr. SCALIA. Whether I agree with it or not; that is right.

Senator SESSIONS. And you have been asked if you have a circumscribed view of your role, but as I understood the question—let me ask you if this is true—you were simply responding to what your legal responsibilities are, what your position calls for you to do, which is not to provide policy advice on every matter that comes before the Department of Labor. Is that correct?

Mr. SCALIA. That is correct, Senator. At times, other issues may get raised peripherally with the Solicitor. The Solicitor does not have an obligation to sit mute in every meeting. But I think it is very important for a lawyer to be reliable for legal advice, and if a lawyer takes on other things, the lawyer becomes less reliable as a lawyer.

Senator SESSIONS. If the Secretary asked you about some matter unrelated to your duties, I assume you would give it your best answer, but in your best answer to the questions you had here, you were referring to what your legal responsibilities are as the Solicitor in the Department of Labor, which is a circumscribed role in many ways, is it not, officially?

Mr. SCALIA. That is correct.

Senator SESSIONS. On the sexual harassment questions you were asked and the article you have written that Senator Reed asked you about, is that the same article that Justice Ruth Bader Ginsburg—who, I think most would say, is clearly the most ardent defender of women's rights on the U.S. Supreme Court—is that the article she wrote you about in which she said, "your article is written with refreshing clarity and style; it is informative, thought-provoking, altogether a treat to read"?

Mr. SCALIA. That is the same article, Senator.

Senator SESSIONS. I do not think she would have written that if she thought you were off the world somewhere in your views on that.

And I want to say about Senator Enzi that he has worked so hard to improve OSHA. The goal that Senator Enzi has worked on and which I support is to make OSHA a vehicle for a clearly improved and more safe workplace without having it coming along after a problem occurs, with a "Gotcha" mentality, to try to make it a positive force. That is not your role—that is our role to deal with that, and we have worked together on it, and he has worked dedicatedly to make sure that we have an OSHA that is out, inspecting before accidents occur, encouraging, helping, advising businesses how to have a safer workplace and reduce injuries. He has made some points about the OSHA bureaucracy and the procedures that are valid. Just because they are known as OSHA does not mean they cannot be an arrogant, bureaucratic, nonresponsive agency, and sometimes it deserves criticism. This Congress voted overwhelmingly, or with a significant bipartisan majority, to reject their OSHA regulations and to send them back for further review by the Secretary of Labor, which is happening today.

But I just want to say that OSHA has played an important role. I believe we need to look at it today to see how we can make it more effective in preventing injuries and reduce its bureaucratic mentality.

You do not have to comment on that unless you desire to do so.

Mr. SCALIA. I understand that OSHA is important to all the members of this committee, and I would look forward to working with them on it if I am confirmed.

Senator SESSIONS. And I hope you will take to heart in your role as you are able to make sure that if we have information that both sides get heard and that you will encourage people to do that.

I am extraordinarily impressed with your testimony. I think you have handled yourself just wonderfully today. You have been professional and thoughtful and responsive and humble and brilliant. So I congratulate you, and I know you will do a great job as Solicitor.

Thank you.

Mr. SCALIA. Thank you.

The CHAIRMAN. Thank you very much.

The way we will proceed now is Senator Wellstone has a question or two, and then I will make a very brief final comment.

Senator WELLSTONE. I will be very brief, because I know we all have to go to caucus luncheons.

Just following up on Senator Sessions, Mr. Scalia, in case you have not noticed, this is a very diverse committee——

Mr. SCALIA. I have noticed.

Senator WELLSTONE. [continuing]. And I want to respond to the comments of my colleague, Senator Enzi.

Senator SESSIONS. Senator Wellstone, I want you to know that the only lawsuit I had against a union was a winning lawsuit from its own employee for failure to pay overtime.

Senator WELLSTONE. Well, Senator Sessions, I would not doubt——

Senator SESSIONS. He is speechless, I can tell.

Senator GREGG. No, no—that never happens. [Laughter.]

The CHAIRMAN. He has just used all his time.

Senator WELLSTONE. I am so impressed with what Senator Sessions told me that I cannot think now.

I wanted to point out just for the record, unless I am wrong, that I had asked you whether you had filed comments supporting a worker protection regulation, and in the House subcommittee testimony, you had talked about and had given OSHA credit for the efforts to codify the recordkeeping requirements. But I also want to point out that you had recommended changes that would change the definition and criteria for recording work-related injuries and illnesses that, if implemented, would reduce the number of injuries and illnesses now being recorded.

I want to point out that I do not actually see that as being testimony that supports worker protection regulation. I would disagree with Senator Enzi. I would not consider these recordkeeping requirements to be “worthless.” I think that when you have less reporting, part of what you are doing is taking away an important foundation of worker protection. That is how we know what is happening in the workplace.

So maybe I am wrong, but in that same testimony that you cited, am I not correct that this was what you said?

Mr. SCALIA. On that point, you are right, Senator, and if I gave the impression that I supported the rule in full, I appreciate your clarifying it.

Senator WELLSTONE. OK. I thank you. And with that clarification, let me just thank you for being here today. I appreciate it.

Mr. SCALIA. Thank you very much.

The CHAIRMAN. Thank you.

I did not get into your views about discouraging even voluntary regulations by businesses in terms of ergonomics. I do not know if you want to make a brief comment on that. You co-authored the article—you included in the UPS brief: “UPS believes that issuing prescriptive RSI guidelines would be as ill-advised as establishing a standard, perhaps more so.” And then, later in the year, you wrote: “The same vigilance is needed with regard to industry. Of immediate concern is the potential disastrous ergonomics standard being set by the American National Standards Institute. As long as it asserts that repetitive work motions can cause injury, it threatens to enhance greatly OSHA’s litigating position.”

So it is not only opposition to any standard, but even where industries were trying to develop that. I do not know if you want to make a comment on that.

Mr. SCALIA. I did encourage employers to look closely at ergonomics and to address employee complaints and to adopt ergonomic measures. The standard-setting by these associations concerned employers because sometimes after the standards are set, OSHA uses them in prosecutions, and so some companies—and one of my clients was included—did not support those voluntary standards for that reason.

The CHAIRMAN. Well, thank you very much.

Just a brief comment in conclusion. As has been mentioned during the committee hearing, the Solicitor of Labor has no ordinary

responsibility and is no ordinary appointment. The Solicitor of Labor is the workers' lawyer, and he is their representative, and he is responsible for protecting the basic interests of literally millions of working men and women in every community and every workplace in the United States. So this position requires a person who will have the confidence of America's workers that their rights being rigorously protected by the Department of Labor.

I think that appointing a Solicitor who does not believe in the dangers of ergonomics is like appointing a high official in the Environmental Protection Agency who does not believe in the existence of pollution or a high-level official in civil rights who does not believe in discrimination.

We need a Solicitor whose background and experience reflect a commitment to the fundamental rights and protections of workers across America.

I respect your ability, Mr. Scalia, but I continue to have the gravest reservations about your nomination for this very important position.

The committee stands in recess.

[Additional material follows.]

ADDITIONAL MATERIAL

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS,
WASHINGTON, D.C. 20006,
September 5, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: Later this month, the Committee on Health, Education, Labor, and Pensions will hold a hearing on the nomination of Eugene Scalia to be Solicitor of Labor. I am writing to inform you of the AFL-CIO's strong opposition to this nomination. The AFL-CIO urges you to oppose Eugene Scalia's confirmation to this important post should his nomination come before the Senate for a vote.

Our opposition to Eugene Scalia's nomination is based on his track record as an outspoken opponent of key worker protection initiatives, including, but not limited to, regulation of workplace ergonomics. It is not the mere fact of Mr. Scalia's opposition that causes us such concern—it is the extreme and radical nature of his opposition that leads us to believe that he is an inappropriate choice for the Solicitor's job.

The Department of Labor and its various agencies are charged by statute with enforcing and implementing more than 180 laws that Congress enacted to provide basic worker protections in critically important areas such as safety and health, minimum wages, equal employment opportunity, and pension security. The Secretary of Labor and the various agency heads play a pivotal role in ensuring that the fundamental protections enacted by Congress are, implemented, respected, and enforced. For some of these protections, such as workplace safety and health, workers are wholly dependent on the Department of Labor, because the governing laws do not provide workers with a private right of action to enforce their statutory rights.

The Solicitor of Labor holds a position of extreme importance and influence within the Department of Labor. As the Department's top lawyer, the Solicitor is one of the leading officials within the Department, widely recognized as third in rank behind only the Secretary herself and the Deputy Secretary. The Solicitor, or his designee, is involved in providing advice and guidance on virtually every policy, legislative, regulatory, and enforcement initiative of the Department and its various agencies. The Solicitor oversees a nationwide staff of 500 attorneys, who are responsible for enforcing the laws within the Department's jurisdiction, as well as defending the Department in litigation against it. Thus, the Solicitor wields considerable influence over the direction the laws and their enforcement take.

For this position of such critical importance to American workers, President Bush has chosen an individual who is unsuited to the task. We say this not because of the nominee's inexperience or lack of ability, but because of his demonstrated track record of extreme hostility to key worker protection initiatives of the very agencies with which he would be working as Solicitor. Eugene Scalia is simply the wrong person for the job.

As a labor and employment lawyer at the Washington, D.C. law firm of Gibson Dunn & Crutcher, Eugene Scalia's practice included advising employers and defending them when they were charged with violating workplace safety, equal employment opportunity, minimum wage and overtime, labor relations and other important laws.

But that is not where Eugene Scalia has made his mark. He has made a name for himself by fighting worker protection initiatives by federal and state agencies, particularly but not exclusively in the area of ergonomics.

It is no exaggeration to say that Eugene Scalia is one of the architects and leaders of the business community's campaign to prevent federal OSHA and numerous state worker safety agencies from issuing strong regulations to protect workers from ergonomic hazards—hazards which result in more than 600,000 serious injuries each year. In California, North Carolina, Washington State, and Washington, D.C., he has been on the front lines leading the fight to keep federal and state agencies from protecting workers from ergonomic hazards.

In fighting these initiatives, Eugene Scalia did not simply oppose a particular ergonomics regulation or suggest that a proposed regulation needed to be clarified or improved. Rather, he has repeatedly expressed his personal view that there is no scientific basis for ergonomics regulation of any kind, and he has repeatedly questioned whether ergonomic injuries are real. For example, in a 1994 "white paper" prepared for the National Legal Center for the Public Interest, entitled

“Ergonomics: OSHA’s Strange Campaign to Run American Business,” Mr. Scalia wrote that “the very existence, not to mention the significance of repetitive strain injuries is of course very much in doubt,” and suggested that “as medical science, ergonomics is quackery.” He later characterized the science supporting ergonomics regulation as “to a large degree junk science *par excellence*.” Eugene Scalia, Government ‘Ergonomic’ Regulation of ‘Repetitive Strain Injuries,’” October 1997). These views surface repeatedly in Eugene Scalia’s personal writings, as well as in filings prepared by Mr. Scalia on behalf of his clients in various rulemakings.

Eugene Scalia’s views on the science underlying ergonomics stand in marked contrast to those of mainstream experts, including the National Academy of Sciences, which, after an exhaustive review of the scientific literature, recently concluded that “a rich and consistent pattern of evidence . . . supports a relationship between the workplace and the occurrence of musculoskeletal disorders of the low back and upper extremities.” National Research Council, “Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities (2001), at 8–9. See also National Institute for Occupational Safety and Health, “Musculoskeletal Disorders and Workplace Factors” (July 1997), at xiv (“A substantial body of credible epidemiologic research provides strong evidence of an association between MSDs and certain work-related physical factors.”)

And what of the hundreds of businesses across America that have developed ergonomics programs in an effort to protect their workers from serious injury? Mr. Scalia has criticized business for its “surprisingly supine” posture regarding ergonomics, and he has warned businesses to “keep tabs on their own in-house ergonomics specialists,” to “take a long, hard look at what they are being sold” by these experts, and to avoid making “premature official pronouncements” about the existence of ergonomics hazards. (Judicial Legislative Watch Report, October 1995; “Strange Campaign” white paper).

Eugene Scalia has also repeatedly suggested that unions are in favor of ergonomics regulation not because we are interested in protecting workers, but as a clever ploy to increase membership. According to Mr. Scalia, ergonomics regulation “would reduce the pace of work, thereby pleasing current members. With the pace of work reduced, more workers would be needed to maintain the level of production; consequently, union membership (and dues) would increase, thereby pleasing union leaders.” (“Government ‘Ergonomic’ Regulation of ‘Repetitive Strain Injuries’” (October 1997)). These views are not only offensive to workers and unions, but also miss the point that ergonomics regulation will undoubtedly benefit non-union workers more than union workers because ergonomics programs already exist in many union workplaces. (Mr. Scalia’s remarks also misrepresent ergonomics regulations, none of which require employers to slow the pace of work).

This theme of unions being interested in worker safety initiatives not out of a concern about workers’ safety but out of an interest in collecting union dues has played elsewhere in Mr. Scalia’s writings. In a January 5, 2000 Wall Street Journal op ed criticizing OSHA’s policy regarding home offices, he stated that “for labor unions, . . . at-home workplaces are a nightmare. How do you unionize workers who don’t come to the office?” According to Mr. Scalia, OSHA’s home office policy needed to be viewed in conjunction with OSHA’s proposed ergonomics rule. That rule, according to Eugene Scalia, “is a major concession to union leaders, who know that ergonomics regulations will force companies to give more rest periods, slow the pace of work, and then hire more workers (read: dues paying members) to maintain current levels of production.”

Fighting ergonomic protections is where Eugene Scalia has made his mark, but it is not the only area in which his stated views are cause for concern about actions he would take as Solicitor of Labor.

For example, both individually and on behalf of his client United Parcel Service, Scalia has criticized another important OSHA rulemaking, this one dealing with the recording of workplace injuries and illnesses. The recordkeeping rules were developed through a 15-year process and enjoy significant support from major stakeholders in the business community. Testifying on his own behalf in July 2000, Mr. Scalia criticized the agency over major aspects of the rule, including the central question of which injuries and illnesses should be recorded. These objections are reflected in a pending lawsuit brought by his former law firm on behalf of the Association of Manufacturers against OSHA’s new recordkeeping rules.

In addition, Mr. Scalia filed comments on behalf of United Parcel Service opposing an OSHA proposal that would require employers, rather than individual employees, to pay for safety equipment when such equipment is required by an OSHA standard. According to UPS, the rule exceeded OSHA’s authority because, in UPS’s view, no safety-related purpose was served by the rule. These views stand in sharp contrast to those of worker safety experts, including the National Institute for Occupa-

tional Safety and Health, who testified that worker safety would be better protected by requiring employers, and not individual workers, to purchase and maintain safety equipment.

The Department of Labor is faced with many crucial decisions about how it will fulfill its mission to protect workers. In the area of ergonomics, an issue of paramount importance to American workers, Secretary of Labor Elaine Chao is in the midst of deciding how the Department will proceed. We have grave doubts about how the Department could possibly take meaningful action on ergonomics, either in the standard-setting or in the enforcement arena, with such an avowed opponent of ergonomics at the helm of its Solicitor's Office. More fundamentally, we have real concerns about what a record like Mr. Scalia's says about his willingness and commitment to vigorously implement and enforce the nation's worker protection laws.

The AFL-CIO did not make the decision to oppose Eugene Scalia's nomination lightly. We recognize that the President has the authority to nominate individuals who reflect his policy views, and that President Bush's policy views differ substantially from ours in many respects. However, in the case of Eugene Scalia, the President has nominated an individual whose extreme views on key worker protections place him outside the mainstream and make him unsuited to hold this important position. He is simply the wrong person for the job. We regretfully but respectfully urge you to oppose his nomination if it should come before the Senate for a vote.

Sincerely,

JOHN J. SWEENEY,
President.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
WASHINGTON, D.C. 20006,
October 2, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: The Leadership Conference on Civil Rights (LCCR), an umbrella organization of more than 185 national organizations representing persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups, has a deep interest in our nation's workplace protections and in the individuals who are chosen to implement and enforce our workplace laws. It is critically important that these individuals be highly qualified, experienced, and dedicated to the rights and protections they are called upon to enforce.

The Solicitor of Labor is a particularly significant position within the Department. The Solicitor is the Department's lawyer, and the lawyer for the agencies within the Department, but he is more than that—he is in a very real sense the lawyer for working Americans. This is so because many of the statutes under the Department's jurisdiction place exclusive enforcement authority in the hands of the Department and do not provide a means for individual workers to pursue enforcement of their rights. Workers are dependent on the Department, and on the Solicitor of Labor, to vindicate crucial protections such as those provided under Executive Order 11246, the Occupational Safety and Health Act, the Workforce Investment Act, and other important laws.

The Leadership Conference on Civil Rights has reviewed the record and writings of Eugene Scalia, President Bush's nominee to be Solicitor of Labor. We are very troubled by some of his views and actions, particularly in the area of worker safety and health protections. Mr. Scalia has been a long-time opponent of ergonomic protections, and has built a career around opposing ergonomic regulations at both the federal and state level as well as opposing voluntary guidelines. He has harshly criticized the Occupational Safety and Health Administration for its actions around ergonomics, has questioned whether scientific support exists for ergonomic protections, and whether ergonomic injuries are even real. He has staked out an extreme position on an issue of utmost importance to the safety and health of American workers. While the vast majority of Mr. Scalia's writings are in the area of ergonomics, his writings have also included criticism of other worker protections and other agencies responsible for workplace protections, such as the Equal Employment Opportunity Commission.

The question facing the Committee and the Senate is whether someone with such divisive and, in some cases, extreme views on key worker protections should be rewarded with the critically important job of Solicitor of Labor and entrusted with implementing and enforcing our workplace laws on behalf of working men and women.

Unfortunately, we believe Mr. Scalia's track record of hostility to crucial worker protections and his controversial views in this area make him an unsuitable choice for the Solicitor's job. Therefore, the Leadership Conference on Civil Rights urges you to oppose Mr. Scalia's nomination should it come before the Committee for a vote. Thank you for your consideration.

Sincerely,

WADE HENDERSON,
Executive Director.
DOROTHY I. HEIGHT,
Chairperson.

AMERICAN NURSES ASSOCIATION,
WASHINGTON, D.C. 20024-2571,
October 1, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20515.

DEAR SENATOR KENNEDY: As the Senate Committee on Health Education, Labor and Pensions prepares to consider the nomination of Eugene Scalia to be Solicitor of the Department of Labor, I am writing to express the opposition of the American Nurses Association to Mr. Scalia's nomination.

ANA is particularly concerned about Mr. Scalia's views on ergonomic injuries in the workplace. He has repeatedly expressed his personal view that there is no scientific basis for ergonomics regulation of any kind and has repeatedly questioned whether ergonomic injuries are real.

Registered nurses suffer musculoskeletal injuries in the workplace at a rate that exceeds truck drivers and construction workers. The views expressed by Mr. Scalia defy the realities of registered nurses at the bedside whose routine includes lifting, bathing, moving and caring for their patients. Repetitive patient handling task and low back injuries, in particular, continue to be the leading causes of injury and disability for nurses. These disorders, more than any other illness or injury, are responsible for lost work time, the need for protracted medical care, and the inability to continue work as a nurse. Mr. Scalia's dismissal of these injuries as "junk science" flies in the face of the conclusions reached by the National Academy of Sciences that "a rich and consistent pattern of evidence . . . supports a relationship between the workplace and the occurrence of musculoskeletal disorders of the low back and upper extremities.

Ergonomic hazards are the primary workplace dangers responsible for debilitating and depleting the ranks of registered nurses. As the nation faces a growing shortage of nurses, it is more important than ever that the agency charged with protecting their health and safety be firmly committed to that goal. Mr. Scalia's extreme views on these protections make him unsuited to hold this critical position within the Department of Labor.

The American Nurses Association appreciates your consideration of our views on this important matter.

Sincerely,

ROSE GONZALEZ,
Director, Government Affairs.

HARVARD SCHOOL OF PUBLIC HEALTH,
BOSTON, MA 02115-9957,
September 21, 2001.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR KENNEDY: On September 20 the Senate Committee on Health, Education, Labor, and Pensions is scheduled to hold a hearing on the nomination of Eugene Scalia to be Solicitor of Labor. I oppose very strongly the nomination of Mr. Scalia to this important position.

The position to which Mr. Scalia has been nominated is one of the most critical for workers. The Solicitor of Labor is the third highest-ranking official in the Department of Labor and has complete responsibility for enforcing the many laws: the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA)

and the Employee Retirement Income Security Act (ERISA), that protect workers and their families.

I believe that the record shows Mr. Scalia is unsuited for this job. In his relatively short time as an attorney, he has made a career of trying to halt or undermine workplace health and safety protections. For the last several years he devoted himself to fighting the passage of an ergonomics standard nationally, as well as in the states of California and Washington, in particular.

Significantly, the record shows that Mr. Scalia has done far more than simply represent clients on these safety and health issues. He has published his personal view that there is no scientific basis for ergonomics regulation or enforcement of any kind, and he has repeatedly questioned whether workers' ergonomic injuries are "real". In a paper entitled "Ergonomics: OSHA's Strange Campaign to Run American Business", Mr. Scalia expressed his doubts about the very existence, not to mention the significance, of repetitive-strain injuries and suggested that "as medical science, ergonomics is quackery".

I believe that these extreme anti-worker views should disqualify Mr. Scalia for the position of Solicitor of Labor. Again, I strongly oppose the nomination of Eugene Scalia for this position, and urge the Committee to refuse to confirm him as Solicitor of Labor.

Thank you for considering my view on this important matter.

Sincerely yours,

DAVID C. CHRISTIANI, MD, MPH,
*Professor of Occupational Medicine and Epidemiology,
Director, Occupational Health Program.*

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-
CIO, CLC (UNITE),
WASHINGTON, D.C. 20006,
September 17, 2001.

DEAR SENATOR: I am writing to inform you of UNITE's strong opposition to the nomination of Eugene Scalia to be Solicitor of Labor. Our opposition to Eugene Scalia's nomination is based on the extreme and radical nature of his track record as an outspoken opponent of key worker protection initiatives, including, but not limited to, regulation of workplace ergonomics.

The Department of Labor and its various agencies enforce and implement more than 180 laws that Congress has enacted to provide basic worker protections such as safety and health, minimum wage, and overtime pay. Because the existing laws do not provide workers with the "private right of action," most workers, and specifically immigrant workers, are wholly dependent on the Department of Labor to enforce their statutory rights.

The Solicitor of Labor holds a position of extreme importance and influence within the Department of Labor. He is involved in providing advice and guidance on virtually every policy, legislative, regulatory, and enforcement initiative of the Department and oversees a nationwide staff of 500 attorneys responsible for enforcing these laws.

Unfortunately, for a position of such importance to American workers, President Bush has chosen an individual who is not suited for the task. Because of his demonstrated track record of extreme hostility to key worker protection initiatives of the very agencies with which he would be working as Solicitor, Eugene Scalia is simply the wrong person for the job.

He has made a name for himself by fighting worker protection initiatives by federal and state agencies, particularly but not exclusively in the area of ergonomics. He is one of the architects and leaders of the business community's campaign to prevent OSHA from issuing strong regulations to protect workers from ergonomic hazards which result in more than 600,000 serious injuries each year. In fighting these initiatives, Eugene Scalia did not just oppose a particular type of ergonomics regulation. Rather, he opposed a standard in a way which demonstrated either his ignorance or contempt for the very principles upon which the Congress based the OSHA Act.

Mr. Scalia has been a well-informed and active participant in the Department's most important regulatory proceeding in at least a decade. He has done so with unfortunate consequences for the vast majority of employers and workers affected by this serious workplace hazard and the costs arising therefrom. The positions he has taken are far removed from the mainstream views of both OSHA's primary stakeholders and the prevailing scientific authorities. He could come to these views in only two ways: a serious—in our view unforgivable—lack of judgment, or conscious

deceit. It is UNITE's opinion that either case renders him completely unsuitable for a position requiring both excellent judgment and the highest ethical standards.

The Department of Labor is faced with many crucial decisions about how it will fulfill its mission to protect American workers. In the area of ergonomics, an issue of paramount importance to American workers, Secretary of Labor Elaine Chao is in the midst of deciding how the Department will proceed with developing an ergonomic standard. We at UNITE have real concerns about what a record like Mr. Scalia's states about his willingness and commitment to vigorously implement and enforce the nation's worker protection laws, including developing and enforcing a new ergonomic standard.

Mr. Scalia is simply the wrong person for the job. We regretfully but respectfully urge you to oppose his nomination if it should come before the Senate for a vote.

Sincerely,

BRUCE RYAN,
President.

CHRIS CHAFE,
Political & Legislative Director.

NATIONAL WOMEN'S LAW CENTER,
WASHINGTON, D.C. 20036,
October 1, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510-2101.

DEAR CHAIRMAN KENNEDY: We are writing to express the National Women's Law Center's serious concerns about the nomination of Eugene Scalia for the position of Solicitor of Labor. As an organization that has been working since 1972 to advance and protect the legal rights and protections of women in the workplace, the Center has a deep and abiding interest in ensuring that those entrusted with enforcing and administering the laws protecting women in the workplace are fully committed to their vigorous enforcement and implementation. Mr. Scalia's record raises serious questions about whether he possesses the necessary commitment to fill this position.

The Solicitor of Labor, as the chief legal officer of the Department of Labor, has the responsibility to enforce a range of laws prohibiting employment discrimination, protecting worker health and safety, and guaranteeing a minimum wage and other employee protections. Among the laws under the Solicitor's responsibility are several of particular importance to women: the Family and Medical Leave Act; Executive Order 11246, prohibiting sex discrimination by federal contractors and requiring these enterprises to have affirmative action plans to help ensure equal opportunity in their workplaces; and health and safety regulations such as those governing ergonomic injuries, which account for a large percentage of the workplace injuries suffered by women.

Our questions about Mr. Scalia's fitness for this critical position are based on his past writings suggesting hostility to exercising the very enforcement role he would be called upon to lead as Solicitor. For example, Mr. Scalia has repeatedly taken the position that repetitive strain injuries do not exist—contrary not only to scientific opinion but also to the experience of the millions of women who work in computer-keyboarding jobs, assembly-line jobs, and other occupations requiring repetitive motions—and he has fought against any regulation of this form of workplace injury. This alone should raise very serious questions about his qualifications to serve as Solicitor. In addition, in his past writings Mr. Scalia has taken a narrow view of when an employer should be held liable for sexual harassment by supervisory personnel in the workplace and has expressed disappointment with recent Supreme Court cases that strengthened the federal protections against sexual harassment in the workplace. He has also urged employers to challenge Equal Employment Opportunity Commission (EEOC) interpretations of the Americans With Disabilities Act (ADA) with which he disagrees, and urged the EEOC to reconsider its enforcement and interpretations of the ADA. Particularly in light of the fact that the Department of Labor and the EEOC have shared responsibility to enforce workplace anti-discrimination laws and cooperative agreements for enforcement of these laws, Mr. Scalia's views toward the EEOC raise troubling questions about his attitude toward the appropriateness of effective enforcement of the anti-discrimination laws by the Department of Labor and how he will approach the need for cooperation between the EEOC and DOL.

These highly disturbing aspects of Mr. Scalia's record must form the backdrop for any serious examination of his fitness to serve as Solicitor of Labor—a position of

great importance to the employment, health, and economic security of women and their families across the country.

Sincerely,

MARCIA D. GREENBERGER,
Co-President.

NANCY DUFF CAMPBELL,
Co-President.

UNITED AMERICAN NURSES (UAN), AFL-CIO,
WASHINGTON, D.C. 20024-2571,
September 17, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: The United American Nurses (UAN), the labor arm of the American Nurses Association, strongly opposes the nomination of Eugene Scalia to be Solicitor of the U.S. Department of Labor. The UAN urges you to oppose his confirmation to this pivotal post should his nomination come before the U.S. Senate for a vote.

Eugene Scalia is simply the wrong person for the job. His views on regulation of workplace ergonomics place him far outside the mainstream of current scientific thinking. He has repeatedly expressed his personal view that there is no scientific basis for ergonomics regulation of any kind and has repeatedly questioned whether ergonomic injuries are real. For example, in a 1994 "white paper" prepared for the National Legal Center for the Public Interest entitled *Ergonomics: OSHA's Strange Campaign to Run American Business*, Scalia claimed that "the very existence, not to mention the significance of repetitive strain injuries, is of course very much in doubt" and suggested that "as medical science, ergonomics is quackery." He later characterized the science supporting ergonomics regulation as "to a large degree junk science par excellence." (Eugene Scalia, *Government 'Ergonomic' Regulation of 'Repetitive Strain Injuries'*, October 1997) Such views surface repeatedly in Mr. Scalia's writings as well as in filings he has prepared on behalf of his clients in various rulemakings.

Registered nurses suffer musculoskeletal injuries at the workplace at a rate that exceeds truck drivers and construction workers. There is nothing phantom about these workplace injuries. The views expressed by nominee Scalia defy the realities of registered nurses at the bedside whose daily routine includes lifting, bathing, moving and caring for their patients. Repetitive patient handling tasks and low back injuries in particular continue to be the leading causes of injury and disability for nurses. These disorders, more than any other illness or injury, are responsible for lost work time, the need for protracted medical care and the inability to continue work as a nurse. It is an understatement to say that the UAN is outraged by Mr. Scalia's reckless and out-of-touch assertions. Nor can the conclusion of the National Academy of Sciences that "a rich and consistent pattern of evidence . . . supports a relationship between the workplace and the occurrence of musculoskeletal disorders of the low back and upper extremities" be justifiably characterized as "quackery" or "junk science." Imagine the public uproar if a nominee for high office in the Environmental Protection Agency were to assert that "the very existence, not to mention the significance of air pollution, is of course very much in doubt." Such a nominee would immediately be identified as grossly out of touch not only with current science but also with common sense.

Ergonomic hazards are the primary workplace dangers responsible for debilitating and depleting the ranks of registered nurses. As the nation faces a growing shortage of nurses, it is more important than ever that the agency in charge of protecting the health and safety of this critical workforce be committed to the challenge. Unfortunately, Eugene Scalia's extreme views on key worker protections make him unsuited to hold a position that advises and guides virtually every policy, legislative, regulatory and enforcement initiative of the Labor Department and its various agencies. Thus the UAN on behalf of the 100,000 registered nurses it represents again respectfully urges you to oppose the nomination of Eugene Scalia to become Solicitor of Labor.

Sincerely,

CHERYL JOHNSON, RN,
Chair, United American Nurses, AFL-CIO.

STATEMENT OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION (UFCW)

On behalf of the 1.4 million members of the United Food and Commercial Workers International Union (UFCW), this testimony is being submitted regarding the pending nomination of Eugene Scalia to the position of Solicitor at the United States Department of Labor (DOL). The UFCW is strongly opposed to this nomination and we urge your opposition. After an exhaustive examination of the nominee's record, public writings, and publicly stated policy positions, it is clear that he is unalterably opposed to, and thus in conflict with, many of the laws and regulations he would be sworn to uphold. The DOL is charged with securing vital minimum workplace protections for the American people in the form of minimum health and safety standards under the Occupational Safety and Health Act, minimum wage and hour protections for work performed under the Fair Labor Standards Act, protections against systemic discrimination by federal contractors and compliance with equal employment opportunity under Executive Order No. 11246 and Section 503 of the Rehabilitation Act of 1973, and job-protected leave for workers for serious health conditions for themselves and their immediate families under the Family and Medical Leave Act. However, as this testimony will demonstrate, this nominee has taken positions against and worked to diminish minimum protections afforded by the very laws for which he would be responsible as Solicitor. We believe that there is demonstrable evidence that he should not be confirmed, and we hope that this testimony helps to provide that evidence.

Chief Law Enforcement Officer

The Solicitor is the chief law enforcement officer of DOL. Enforcement is the linchpin of vital laws to protect American workers. Enforcement prevents delay and obstruction of the law, and as Dr. Martin Luther King, Jr. so eloquently said, "Justice delayed is justice denied."

The Nominee vs. The Department of Labor

A cursory examination of the nominee's record, with regard to the workplace protection laws he would be charged with upholding if confirmed as Solicitor, will demonstrate several things. The nominee has well-known, well-developed views in several important areas. One such area is the mandate implemented by the Office of Federal Contract Compliance Programs (OFCCP) at DOL. The OFCCP enforces laws which cover approximately 25 percent of the civilian workforce employed by about 200,000 federal contractor establishments. OFCCP, *inter alia*, prohibits systemic discrimination and promotes equal employment opportunity in hiring and other employment decisions by federal contractors under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973, as amended. Under these two laws, OFCCP prohibits systemic discrimination based on race, color, religion, sex, or national origin and disability.

The nominee has addressed the issue of liability for sexual harassment under Title VII of the Civil Rights Act of 1964. He expressly opposed employer liability for all forms of supervisory sexual harassment of a subordinate, including situations in which a supervisor expressly conditions continued employment upon submitting to sexual favors. Writing in a 1998 issue of the *Harvard Journal of Law and Public Policy*, Scalia stated, "I believe the employer should not be liable in any of these scenarios unless it endorsed the conduct."¹ Although he concedes that a harassing supervisor "uses power and opportunity supplied by the company," he believes employers generally should not be liable for the harassment because "it should be apparent . . . that a supervisor has no authority to demand sexual favors."² Thus, absent proof that the employer actually endorsed the conduct, Scalia would impose no liability on the employer whose supervisor orders his assistant, with the threat that she will be fired if she doesn't submit, to accompany him on a business trip and gropes her in the office, at dinner, and in the hotel. The nominee also shows hostility toward the necessary protections against sex discrimination in the workplace when he states that where a supervisor threatens an employee with reprisal to get her to submit to sexual favors and the employee does so there is no adverse job action affecting the employee.³ For the nominee, a supervisor who requires an employee to also provide sexual favors in addition to the job-related criteria for securing particular benefits of employment is not engaging in an adverse job action.⁴ Al-

¹ Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 Har. J.L. & Pub. Pol'y 307, 323 (1998).

² *Id.*

³ 21 Har.J.L. &Pub. Pol'y at 321.

⁴ *Id.*

though Scalia was expressing views about sexual discrimination under Title VII, Title VII analysis is fully applicable to discrimination analysis under other federal laws and regulations, including Executive Order 11246 which the Solicitor of Labor is charged with enforcing.

Scalia has also expressed hostility to combating discrimination based on disability. The objective of a nominee to Solicitor to weaken the Americans with Disabilities Act (ADA) deserves critical focus because the Solicitor oversees the OFCCP which shares enforcement authority with EEOC for Title I (employment provisions) of the Americans with Disabilities Act (ADA) and enforces Section 503 of the Rehabilitation Act, as amended, which now is interpreted the same as the ADA. Thus, he urges employers to challenge the status of working as a major life activity under the ADA. Under the ADA, disability is defined, *inter alia*, as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”⁵ The EEOC’s regulations provide a nonexhaustive list of major life activities to include caring for oneself, performing manual tasks, and working.⁶ The EEOC, in its interpretive guidance, defines major life activity as those basic activities that the average person in the general population can perform with little difficulty.⁷ Scalia’s aim to remove “working” from the definition of major life activity would eviscerate the ADA. Thus, in Scalia’s view, contrary to the decision of the United States Court of Appeals for the First Circuit, an employee with bilateral carpal tunnel syndrome, irritated ulnar nerves, and arm/shoulder syndrome which prevented her from performing a variety of tasks, which covered a broad range of jobs over various classes, including repetitive and overhead tasks, pulling and pushing out from her body, and lifting over ten pounds due to the extreme pain such tasks caused would not have an ADA disability.⁸ Under the nominee’s model workplace, this employee with bilateral carpal tunnel would not be disabled and would have no redress under federal anti-discrimination law.

As stated above, the Solicitor also is obligated to enforce the OSHA and FLSA. But in an article written just this year, the nominee urged that employers whose employees are union-represented be exempted from enforcement of OSHA and FLSA.⁹ Peering under the thin veneer of intellectuality in his writings, it is clear that Scalia wants to place the responsibility to enforce employment regulations on unions. Scalia believes that unions are the principal advocates of employment regulation with the aim of protecting union jobs and wages by raising costs of non-union companies.¹⁰ Specifically, he urged exemption from OSHA’s programmed inspections and from the FLSA’s overtime requirements. Under this version of FLSA non-enforcement, employees covered by collectively bargained wages would be barred from challenging violations of FLSA’s overtime provisions, thereby elevating a private agreement above public law.¹¹ He urges a similar exemption from OSHA enforcement and would force unions to be the front-line enforcers to ensure safe workplaces and prevent employer retaliation against those who complain of violations of health and safety laws.¹² Specifically, Scalia wants to end the ability of whistleblowers to obtain agency relief from employer retaliation for voicing complaints about workplace violations.¹³ The result will be overburdened unions struggling to oversee enforcement of minimum workplace protections OSHA is charged with securing. Further, Scalia’s plan for OSHA would add another layer of bureaucracy and delay to securing statutory rights to workplace health and safety, as OSHA would have to establish a procedure for review of private enforcement efforts. Promoting use of private enforcement of vital minimum workplace protections will reduce overall protection of statutory rights, because unlawful conduct will be shielded from public evaluation and reproach.

Going further than seeking to eviscerate prohibitions on disability discrimination where the disability substantially limits the major life activity of working, the nominee, in a 1994 article for the National Legal Center for the Public Interest, questioned the very existence of common repetitive strain injuries of the type suffered by the plaintiff in *Quint v. Staley Manufacturing Co.* In his own words, he suggested that, “as medical science, ergonomics is quackery.”

⁵ 42 U.S.C. Section 12102(2)(A).

⁶ 29 CFR Section 1630.2(i).

⁷ EEOC Interpretive Guidance, Major Life Activities—1630.2(i).

⁸ *Quint v. A.E. Staley Manufacturing Co.*, 172 F.3d 1, 6, 11–12 (1st Cir. 1999)(court awarded reinstatement, back pay, and punitive damages).

⁹ Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 Harv. J.L. & Pub. Pol’y 489 (2001).

¹⁰ *Id.* at 490–91.

¹¹ *Id.* at 496.

¹² *Id.* at 495.

¹³ *Id.* at 494–95.

Summary

In summary, the nominee believes that unions—not the federal government—should enforce the law in unionized workplaces, that employers should be free from legal responsibility when their supervisors sexually harass their employees, that “work” is not a major life activity, and that there are no ergonomic injuries. These views, taken together, show that the nominee has direct conflicts with the laws the Department enforces. It is these views that will color his discussion on enforcement policy, legislative initiatives by both the Congress and the Administration, on regulatory rulemaking at the Department of Labor, and every case that the Department may consider taking to court.

It does not have to be this way. The Senate should reject this nomination and urge the Administration to nominate someone who can fairly and impartially enforce that nation’s laws and represent the views of the Administration.

Thank you for your consideration of this testimony. We would be happy to respond to inquiries.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-
CIO & CLC,
WASHINGTON, D.C. 20006-1598,
October 1, 2001.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR MR. CHAIRMAN: On behalf of the 1.4 million members of the United Food and Commercial Workers International Union (UFCW), I am writing to you on an issue of utmost importance. On October 3, 2001, the Senate Committee on Health, Education, Labor and Pensions is scheduled to hold a hearing on the nomination of Mr. Eugene Scalia for Solicitor of Labor. UFCW is strongly opposed to this nomination and urges your opposition.

The Solicitor of Labor, the third highest ranking official in the Department of Labor, is vitally important to all of the policies within the Department of Labor. The Solicitor is integral to workplace enforcement for the development of regulatory and legislative policy, as well as to any litigation related to the Department’s work. All of the important laws that protect workers and their families—such as, the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), and the equal employment and nondiscrimination statutes and executive orders—find the Solicitor as their chief enforcement officer.

UFCW believes Mr. Scalia’s record makes him unsuited to be confirmed to this position. He has made a career of working to halt or undermine workplace health and safety protections. For the last several years, he has been a leader in the fight against promulgation of a reasonable, workable ergonomics standard to prevent ergonomic injuries among America’s workers. Mr. Scalia has not only represented the views of clients on these safety and health issues, in a paper entitled “Ergonomics: OSHA’s Strange Campaign to Run American Business,” he expressed doubts about whether repetitive strain injuries even exist. In his own words, Mr. Scalia suggested that, “as medical science, ergonomics is quackery.” If DOL chooses not to promulgate regulations regarding ergonomics, and workers have to continue to rely on the general duty clause for protection, it is unlikely, given Mr. Scalia’s record on this issue, that he would uphold these citations.

In addition, the nominee has expressed frightening views about sex discrimination under Title VII, which are fully applicable to DOL’s mandate under Executive Order 11246 to prevent gender discrimination and promote equal opportunity by federal contractors. He has opposed employer liability for all forms of supervisory sexual harassment of a subordinate, including situations in which a supervisor expressly conditions continued employment upon submitting to sexual favors. Writing in a 1998 issue of the Harvard Journal of Law and Public Policy, Scalia stated, “I believe the employer should not be liable in any of these scenarios unless it endorsed the conduct.” Further, he expresses the view that an employee who submits to this type of sexual harassment has not suffered an adverse job action.

Equally objectionable are the nominee’s views on combating disability discrimination. Importantly, DOL’s Office of Federal Contract Compliance Programs (OFCCP) shares with the Equal Employment Opportunity Commission (EEOC) enforcement authority for Title I (employment provisions of the Americans with Disabilities Act [ADA]), and solely enforces Section 503 of the Rehabilitation Act. Yet the nominee has also urged employers to challenge disabilities of employees whose impairments

substantially limit them in the major life activity of working by claiming that “working” should not be deemed a major life activity under the ADA.

While there is no question about the ability of a President to place within the government personnel of their choosing, there is also no doubt about the role of the Senate in confirming such nominees. It is our hope that the Committee will examine the totality of the record of this nominee. We are certain that if you do, you will find ample evidence of a record that does not justify confirmation.

Thank you for your consideration of these views.

Sincerely,

DOUGLAS H. DORITY,
International President.

AMERICANS FOR DEMOCRATIC ACTION,
WASHINGTON, D.C. 20006,
September 26, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: We are deeply concerned about the nomination of Eugene Scalia to become Solicitor at the Department of Labor. Placing such an unflinching opponent of worker interests, most notably workplace safety regulations, into the Solicitor post is akin to putting the fox in charge of the chicken coop.

In this position, Scalia would be intimately involved in almost all policy-making and regulation-enforcement under the jurisdiction of the Department of Labor. Furthermore, he would directly oversee 500 federal attorneys charged with enforcing the nation's labor laws. As a longtime champion of working Americans, we urge you to oppose the nomination of such a vehement foe of worker rights.

Here are some telling details on Eugene Scalia:

- He has written that “the very existence, not to mention the significance of repetitive strain injuries is of course very much in doubt.”
- Scalia has helped lead the business community's campaign to prevent federal and state worker safety regulations from being enforced.
- He has raised questions about the scientific basis of workplace ergonomic injuries, stating that research supporting ergonomics regulation is “to a large degree junk science *par excellence*,” and “as medical science, ergonomics is quackery.”
- Scalia has claimed that unions favor ergonomics regulations solely as a way to increase membership: “(Regulations) would reduce the pace of work, thereby pleasing current members. With the pace of work reduced, more workers would be needed to maintain the level of production; consequently, union membership would increase, thereby pleasing union leaders.”
- He has worked in opposition to an OSHA standard requiring employers, not individual employees, to purchase safety equipment when the equipment is required by law.

Please contact me if you need any additional material on Scalia. To allow such an outspoken opponent of worker rights to serve as Solicitor of Labor is ill-advised, to say the least.

Sincerely,

AMY ISAACS,
National Director.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE &
AGRICULTURAL, IMPLEMENT WORKERS OF AMERICA,
DETROIT, MICHIGAN 48214,
September 18, 2001.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: On September 20, the Senate Committee on Health, Education, Labor and Pensions is scheduled to hold a hearing on the nomination of Eugene Scalia to be Solicitor of Labor. The UAW strongly opposes the nomination of Mr. Scalia to this important position.

The position to which Mr. Scalia has been nominated is one of the most critical for workers. The Solicitor of Labor is the third highest ranking official in the Department of Labor and has complete responsibility for enforcing the many laws—

such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and the Employee Retirement Income Security Act (ERISA)—that protect workers and their families.

The UAW believes the record shows Mr. Scalia is unsuited for this job. In his relatively short time as an attorney, he has made a career of trying to halt or undermine workplace health and safety protections. For the last several years, he devoted himself to fighting the passage of an ergonomics standard nationally, as well as in California and Washington states.

Significantly, the record shows that Mr. Scalia has done far more than simply represent clients on these safety and health issues. He has published his personal view that there is no scientific basis for ergonomics regulation or enforcement of any kind, and has repeatedly questioned whether workers' ergonomic injuries are "real." In a paper entitled "Ergonomics: OSHA's Strange Campaign to Run American Business," Mr. Scalia expressed his doubts about the very existence, not to mention the significance, of repetitive strain injuries and suggested that "as medical science, ergonomics is quackery."

The UAW submits that these extreme anti-worker views should disqualify, Mr. Scalia for the position of Solicitor of Labor. Accordingly, the UAW opposes the nomination of Eugene Scalia for this position, and urges the Committee to refuse to confirm him as Solicitor of Labor. Thank you for considering our views on this important matter.

Sincerely,

STEPHEN P. YOKICH,
President, UAW.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,
WASHINGTON, D.C. 20001-2797,
September 25, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: The Communications Workers of America (CWA) urges you to oppose the nomination of Eugene Scalia to be Solicitor of Labor if it comes before the Senate for debate and vote.

The Solicitor is responsible for enforcing and implementing more than 180 laws enacted by Congress to protect workers. These include safety and health laws, the minimum wage statute, equal employment rights and retirement income security. With regard to the enforcement of these laws, the Solicitor is vested with significant discretionary authority to determine whether to pursue violations or file appeals. The Solicitor provides guidance on nearly every major policy, legislative, regulatory or enforcement initiative that the Department of Labor undertakes.

Unfortunately, the President has nominated for this important position an individual whose track record renders him unsuitable. Instead of demonstrating a commitment to implement vigorously and enforce effectively employment laws, the nominee has sought to erode rights conferred by them.

Most disturbing, the viewpoint espoused by Mr. Scalia on safety and health matters during his work as a private sector lawyer stands in marked contrast with the need for enforcement of these laws. Mr. Scalia has challenged the existence of repetitive motion injuries. In a 1994 "white paper" prepared for the National Legal Center for the Public Interest, Mr. Scalia wrote that "the very existence, not to mention the significance of repetitive strain injuries is of course much in doubt."

Mr. Scalia went on to write, "as medical science, ergonomics is quackery." He later wrote that the science undergirding economic regulation is "to a large extent junk science par excellence."

Contrary to Mr. Scalia's writings, each year, more than 600,000 workers lose time from their jobs due to repetitive motion injuries. These impairments are now the fastest growing safety and health problems in America's workplaces. Repetitive motion injuries account for more than one-third of all disabling ailments.

If Mr. Scalia is unable to recognize the existence of the most prevalent injury in the American workplace, how could he vigorously enforce the law that would protect the safety and health of our nation's wage earners?

The nominee has also defended employers who were charged with violating equal employment opportunity laws, the minimum wage statute and other legal protections enacted by Congress.

In conclusion, the President has nominated an individual whose views are at variance with the responsibilities of the position he would occupy. He is the wrong per-

son for the job. On behalf of the 740,000 active members of the Communications Workers of America, I urge you to oppose the nomination of Eugene Scalia to serve as Solicitor of Labor.

Sincerely,

BARBARA J. EASTERLING,
Secretary-Treasurer.

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, AFL-CIO,
SAN FRANCISCO, CALIFORNIA 94109,
September 14, 2001.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C. 20510.

DEAR SENATOR KENNEDY: As President of the International Longshore and Warehouse Union, I am urging you to vote against the confirmation of Eugene Scalia to be Solicitor of Labor should his nomination come before the Senate for a vote. Later this month, the Committee on Health, Education, Labor and Pensions will hold a hearing on the nomination. For more than a decade Scalia has made a career opposing important workplace regulations and enforcement action. After carefully reviewing the writings and public statements of Scalia on ergonomics and other OSHA initiatives, I have come to the conclusion that his views are simply too far right to give me any comfort that he will fairly enforce the nation's labor laws and give American workers the protections they have come to appreciate and depend on to protect their health and safety.

The Solicitor of Labor is an extremely important and influential position within the Department of Labor and is recognized as third in rank behind the Secretary and the Deputy Secretary. Not only is the Solicitor the "top lawyer" within the Department, but oversees a nationwide staff of 500 attorneys who are responsible for enforcing the 180 laws within the Department's jurisdiction as well as defending the Department in litigation against it. The Solicitor is directly involved in providing advice and guidance on virtually every policy, legislative, regulatory and enforcement initiative of the Department and its various agencies. Finally, unlike other agencies, the Solicitor of Labor has a great deal of direct litigation authority and can bring cases and file appeals without first obtaining the approval of the Department of Justice.

Eugene Scalia should not be confirmed as Solicitor of Labor because of his anti-worker track record of opposition to key worker protection initiatives including regulation of workplace ergonomics. As a labor and employment lawyer at the law firm of Gibson, Dunn & Crutcher, Scalia advised employers and defended them when they were charged with violating workplace safety, equal employment opportunity, minimum wage and overtime, labor relations and other important laws. He was also one of the principal leaders of the business community's campaign to prevent federal OSHA from issuing strong regulations to protect workers from ergonomics injuries. In addition, Scalia led the fight to keep the states of California, North Carolina, Washington and Washington, DC from issuing regulations to protect their workers from ergonomics injuries. In his personal writings, he has questioned the existence of repetitive strain injuries and has even dismissed ergonomics as "medical quackery."

Eugene Scalia has opposed other key worker protections. Both individually and on behalf of his client United Parcel Service, Scalia criticized OSHA's proposed amendments to its rules governing the recording of workplace injuries and illnesses—recordkeeping rules that were developed through a 15 year process including input from the business community. He also filed comments opposing an OSHA rule that would require employers, rather than individual employees, to pay for safety equipment when an OSHA standard requires such equipment. In addition, Scalia has filed other comments critical of regulatory initiatives, including Contractor Responsibility, OSHA recordkeeping and Hours of Service Regulation.

Working men and women depend on the Department of Labor to implement and enforce the nation's worker protection laws. They need a Solicitor of Labor who believes in these laws and who will vigorously enforce them. Eugene Scalia is simply the wrong person for this job. The International Longshore and Warehouse Union urges you to vote against his nomination should it come to the floor of the Senate.

Sincerely,

JAMES SPINOSA,
President.

THE NATIONAL TREASURY EMPLOYEES UNION,
WASHINGTON, DC 20004-2037,
September 17, 2001.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN KENNEDY: The National Treasury Employees Union (NTEU) is America's largest federal sector, independent labor union, representing 150,000 federal workers in 25 agencies. From Customs Service officers to employees of the Energy Department to IRS agents, our members go to work every day to serve their country. NTEU has never shirked from seeking to protect their health and safety on the job.

I am sure you have heard from many in the private sector on the important workplace safety issue of ergonomics. It should be remembered that our federal workplaces are subject to the same OSHA standards as the private sector. That is why NTEU has long sought a fair and meaningful ergonomic standard to protect our members and all workers.

Because of the critical nature of this issue as well as other concerns, NTEU has determined we cannot support the nomination of Eugene Scalia as Solicitor of Labor. I ask that you join us in opposition to this nomination.

Mr. Scalia has a public and well documented history of opposition to essential workplace safety protections. He has been a national leader against the ergonomic standard issued by the Department of Labor and later (wrongly) suspended. In the meantime, over 600,000 private and public sector workers have suffered on the job ergonomic injuries since this action. His hostility has not been limited to the particular standard put forward by the previous Administration, but to ergonomic regulation in general, labeling ergonomic protections "junk science" and "quackery."

I hope NTEU can count on your support on this important matter. If you or your staff have any questions, please feel free to call Kurt Vorndran of the NTEU Legislation Department at 202.783.4444 ext. 2617. Thank you.

Sincerely,

COLLEEN M. KELLEY,
National President.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME—
AFL-CIO

The 1.3 million members of the American Federation of State, County and Municipal Employees (AFSCME) strongly oppose the nomination of Eugene Scalia to be Solicitor of the United States Department of Labor (DOL). In our view, Mr. Scalia's extreme anti-worker record clearly disqualifies him for the position within the Department of Labor that is charged with enforcing important labor laws.

Eugene Scalia's record shows that he is a staunch opponent of initiatives to protect the health and safety of America's workers. The radical nature of his opposition proves that he is not the appropriate candidate for this important post. He played an instrumental role in preventing federal and state agencies from implementing strong protections designed to safeguard workers from the nation's preeminent workplace safety and health threat—ergonomics injuries. Despite massive evidence from the scientific community that ergonomic hazards are real and result in hundreds of thousands of workplace injuries each year, Mr. Scalia referred to ergonomics regulations as "quackery" and "junk science." These reviews appear throughout his personal writings and legal filings.

However, Mr. Scalia's anti-worker reputation is not limited to defeating ergonomics regulations. As an employment and labor attorney in Washington, D.C., he has compiled a long record of advising and defending clients who have been accused of violating laws on minimum wage, overtime, equal employment opportunity and labor relations. He has opposed efforts to improve rules and regulations including simple recordkeeping requirements for employers. This long and consistent record makes it clear that Mr. Scalia is not the appropriate person to serve as Solicitor of Labor. How can he be expected to enforce laws that he does not support and that he has worked tirelessly to change?

As a labor union, we are particularly offended by Mr. Scalia's accusation that unions are pushing for ergonomics protections because we see this as a creative tool to use in our organizing efforts. His views are offensive to the very people who the DOL seeks to serve, not to mention the thousands of workers who are injured on the job each year.

The Office of the Solicitor serves a critical function at the DOL. The Solicitor's office is responsible for enforcing the various laws that fall under DOL's jurisdiction. The Solicitor also is responsible for litigating on behalf of the agency. We do not believe that Mr. Scalia can honorably perform this function with any amount of credibility since he has devoted his career to opposing these laws.

For an entire decade Eugene Scalia has worked to eliminate and weaken important worker protection laws. Regardless of an individual's personal beliefs or political ideology, worker protection laws must be recognized as the law of the land. They must be at the very least, enforced. Eugene Scalia has demonstrated a lack of sensitivity to the workers in this country. He has demonstrated a willingness to sacrifice the well being of America's workers for the benefit of special interests. For the forgoing reasons AFSCME urges that his nomination be rejected.

[Whereupon, at 12:55 p.m., the committee was adjourned.]

